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NORTH CAROLINA REPORTS.

VOL. 140.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

[v. 140]

FALL TERM, 1905.
SPRING TERM, 1906.

BY

J. CRAWFORD BIGGS,

STATE REPORTER.

(VOL. IV.)

DURHAM, N. C.:
PRESS OF THE SEEMAN PRINTERY.
1906.

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OF THE

SUPREME COURT OF NORTH CAROLINA,

FALL TERM, 1905.
SPRING TERM, 1906.

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,
HENRY G. CONNOR,
GEORGE H. BROWN, JR.,
WILLIAM A. HOKE.

ATTORNEY-GENERAL:

ROBERT D. GILMER.

SUPREME COURT REPORTER:

J. CRAWFORD BIGGS.

CLERK OF THE SUPREME COURT:

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

Name.	*District.*	*County.*
George W. Ward	First	Pasquotank.
Robert B. Peebles	Second	Northampton.
Henry R. Bryan	Third	Craven.
Charles M. Cooke	Fourth	Franklin.
Oliver H. Allen	Fifth	Lenoir.
William R. Allen	Sixth	Wayne.
T. A. McNeill	Seventh	Robeson.
Walter H. Neal	Eighth	Scotland.
Thomas J. Shaw	Ninth	Guilford.
Benjamin F. Long	Tenth	Iredell.
Erastus B. Jones	Eleventh	Forsyth.
James L. Webb	Twelfth	Cleveland.
W. B. Councill	Thirteenth	Catawba.
M. H. Justice	Fourteenth	Rutherford.
Frederick Moore	Fifteenth	Buncombe.
Garland S. Ferguson	Sixteenth	Haywood.

SOLICITORS.

Name.	*District.*	*County.*
Hallett S. Ward	First	Washington.
Walter E. Daniel	Second	Halifax.
L. I. Moore	Third	Pitt.
Charles C. Daniels	Fourth	Wilson.
Rudolph Duffy	Fifth	New Hanover.
Armistead Jones	Sixth	Wake.
C. C. Lyon	Seventh	Bladen.
L. D. Robinson	Eighth	Anson.
Aubrey L. Brooks	Ninth	Guilford.
William C Hammer	Tenth	Randolph.
S. P. Graves	Eleventh	Surry.
Heriot Clarkson	Twelfth	Mecklenburg.
Moses N. Harshaw	Thirteenth	Caldwell.
J. F. Spainhour	Fourteenth	Burke.
Mark W. Brown	Fifteenth	Buncombe.
Thaddeus D. Bryson	Sixteenth	Swain.

LICENSED ATTORNEYS.

SPRING TERM, 1906.

Bean, Eugene H.	Rowan County.
Bird, Samuel A.	Wayne County.
Bispham, Edward H.	Maryland.
Brothers, Henry L.	Cumberland County.
Carter, Henry C., Jr.	Hyde County.
Clark, Walter, Jr.	Wake County.
Cohoon, Walter L.	Pasquotank County.
Dunn, Adolphus W.	Rockingham County.
Elliott, Horace C.	Rutherford County.
Gash, Robert L.	Transylvania County.
Gilmer, Branner	Haywood County.
Greer, Lee	New Hanover County.
Hairfield, Edward M.	Virginia.
Harbison, Roger W.	Kentucky.
Hassell, Francis S.	Martin County.
Henderson, John R., Jr.	Wilkes County.
Jonas, Charles A.	Lincoln County.
McKinney, Thomas S.	Burke County.
Osborne, James W.	Mecklenburg County.
Petree, Frank H.	Stokes County.
Phillips, Robert L.	Graham County.
Picot, John M.	Warren County.
Randolph, Eugene J.	Buncombe County.
Scull, James H.	Columbus County.
Sherrod, William J.	Martin County.
Simmons, Thomas W.	Sampson County.
Sorrell, Delos W.	Durham County.
Timberlake, Edgar W., Jr.	Wake County.
Townsend, Newman, A.	Robeson County.
Vernon, John H., Jr.	Person County.
Young, Ernest F.	Harnett County.

CALENDAR OF COURTS

TO BE HELD IN

North Carolina During the Fall of 1906 and Spring of 1907.

SUPREME COURT.

The Supreme Court meets in the City of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1906.	Spring Term, 1907.
First District	August 28	February 5
Second District	September 4	February 12
Third District	September 11	February 19
Fourth District	September 18	February 26
Fifth District	September 25	March 5
Sixth District	October 2	March 12
Seventh District	October 9	March 19
Eighth District	October 16	March 26
Ninth District	October 23	April 2
Tenth District	October 30	April 9
Eleventh District	November 6	April 16
Twelfth District	November 13	April 23
Thirteenth District	November 20	April 30
Fourteenth District	November 27	May 7
Fifteenth District	December 4	May 14
Sixteenth District	December 11	May 21

SUPERIOR COURTS.

Spring Terms date from January 1 to June 30.
Fall Terms date from July 1 to December 31.

(The parenthesis numeral following the date of a term indicates the number of weeks during which court may hold).

FIRST JUDICIAL DISTRICT.

FALL TERM, 1906—Judge T. A. McNeill.
SPRING TERM, 1907—Judge W. R. Allen.
Beaufort—Oct. 15 (2); Dec. 3 (3); Feb. 11 (2); †Apr. 15 (1); *May 13 (1).
Currituck—Sept. 3 (1); Feb. 25 (1).
Camden—Sept. 10 (1); Mar. 4 (1).
Pasquotank—Sept 17 (1); †Nov. 26 (1); †Jan. 14 (2); Mar. 11 (2).
Perquimans—Sept. 24 (1); Mar. 25 (1).
Chowan—Oct. (1); Apr. (1) 1.
Gates—Oct. 8 (1); Apr. 8 (1).
Washington—Oct. 29 (1); Apr. 22 (1).
Tyrrell—Nov. 5 (1); Apr. 29 (1).
Hyde—Nov. 19 (1); May 20 (1).
Dare—Nov. (12) 1; May 6 (1).

SECOND JUDICIAL DISTRICT.

FALL TERM, 1906—Judge W. H. Neal.
SPRING TERM, 1907—Judge T. A. McNeill.
Halifax—Aug. 20 (2); Nov. 26 (2); *Jan. 28 (1); Mar. 4 (2); June 3 (2).
Northampton—‡Aug. 6 (1); Oct. 29 (2); ‡Jan. 21 (1); Mar. 25 (2).
Warren—Sept. 17 (2); Feb. 11 (1); June 17 (2).
Bertie—‡Sept. 10 (1); Nov. 12 (2); ‡Feb. 18 (1); Apr. 29 (2).
Hertford—*Aug. 13 (1); Oct. 15 (2); Feb. 25 (1); Apr. 22 (1).

THIRD JUDICIAL DISTRICT.

FALL TERM, 1906—Judge T. J. Shaw.
SPRING TERM, 1907—Judge W. H. Neal.
Pitt—Sept. 17 (2); †Nov. 5 (2); Jan. 14 (2); †Mar. 18 (2); Apr. 22 (2).
Craven—*July 2 (1); *Oct. 1 (1); †Oct. 8 (1); †Nov. 19 (2); †Feb. 11 (1); *Apr. 8 (1); †May 6 (2).
Greene—Sept. 3 (1); Dec. 3 (2); Feb. 25 (1); †May 27 (2).
Carteret—Oct. 15 (1); Mar. 11 (1).
Jones—Oct. 29 (1); Apr. 1 (1).
Pamlico—Oct. 22 (1); Apr. 15 (1).

FOURTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge B. F. Long.
SPRING TERM, 1907—Judge T. J. Shaw.
Franklin—*Aug. 20 (1); †Oct. 15 (2); Jan. 21 (2); Apr. 15 (2).
Wilson—Sept. 3 (1); Nov. 12 (2); Feb. 4 (2); May 6 (2).
Vance—Oct. 1 (2); Feb. 18 (2); May 20 (2).
Edgecombe—Sept. 10 (1); †Oct. 29 (2); Mar. 4 (1); †Apr. 1 (2).
Martin—Sept. 17 (1); Dec. 10 (1); Mar. 18 (1); June 17 (1).
Nash—Aug. 27 (1); Nov. 26 (2); Mar. 11 (1); Apr. 29 (2).

FIFTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge E. B. Jones.
SPRING TERM, 1907—Judge B. F. Long.
New Hanover—*July 23 (2); *Sept. 24 (1); †Oct. 1 (2); †Dec. 3 (1); *Jan. 21 (2); *Apr. 1 (1); †Apr. 8 (2); †May 27 (2).
Pender—Sept. 10 (2); Jan. 14 (1), Mar. 25 (1).
Duplin—Aug. 27 (2); Nov. 19 (2); Feb. 18 (2).
Sampson—Aug. 6 (2); Oct. 22 (2); Feb. 4 (2); Apr. 29 (2).
Lenoir—Aug. 20 (1); Nov. 5 (2); Dec. 10 (2); Jan. 7 (1); Mar 11 (2); May 20 (1); June 10 (2).
Onslow—July 16 (1); Oct. 15 (1); Mar. 4 (1); Apr. 22 (1).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

SIXTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge James L. Webb.

SPRING TERM, 1907—Judge E. B. Jones.

Harnett—Sept. 3 (1); †Nov. 12 (2); Feb. 4 (2); May 20 (1).

Johnston—Sept. 10 (2); Dec. 10 (2); Mar. 4 (2).

Wake—*July 9 (2); *Sept. 24 (2); †Oct. 22 (3); *Jan. 7 (2); †Feb. 18 (2); *Mar. 25 (2); †Apr. 22 (2).

Wayne—Aug. 20 (2); Nov. 26 (2); Jan. 21 (2); Apr. 8 (2).

SEVENTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge W. B. Councill.

SPRING TREM, 1907—Judge James L. Webb.

Columbus—Sept. 3 (1); Nov. 26 (1); Feb. 25 (1); Apr. 15 (2).

Cumberland—*Aug. 27 (1); †Oct. 22 (2); *Nov. 19 (1); *Jan. 14 (1); †Feb. 18 (1); ‡Mar. 25 (1); †Apr. 29 (2); *May 27 (1).

Robeson—*July 23 (1); †Sept. 10 (2); *Nov. 5 (2); †Dec. 3 (1); *Feb. 4 (2); †Apr. 1 (2); †May 20 (1).

Bladen—Oct. 15 (1); Jan. 7 (1); Mar. 11 (1).

Brunswick—Sept. 24 (1); Mar. 18 (1).

EIGHTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge M. H. Justice.

SPRING TERM, 1907—Judge W. B. Councill.

Anson—*Sept. 10 (1); †Oct. 8 (1); †Dec. 3 (1); *Jan. 14 (1); †Feb. 11 (1); †Mar. 4 (1); *Apr. 15 (1); †May 13 (1); †June 11 (1).

Chatham—†Aug. 6 (1); Nov. 12 (1); Feb. 4 (1); May 6 (1).

Moore—*Aug. 13 (1); †Sept. 17 (1); *Nov. 19 (1); †Dec. 10 (1); †Jan. 21 (1); †Mar. 25 (1); *Apr. 22 (1); †May 20 (2).

Richmond—*Sept. 3 (1); †Sept. 24 (2); *Jan. 7 (1); †Apr. 1 (2).

Scotland—*Sept. 17 (1); †Oct. 22 (1); †Mar. 11 (1); *Apr. 29 (1); June 3 (1).

Union—*July 30 (1); †Aug. 20 (2); *Oct. 29 (2); *Jan. 28 (1); †Feb. 18 (2); *Mar. 18 (1).

NINTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge Fred. Moore.

SPRING TERM, 1907—Judge M. H. Justice.

Durham—*Aug. 27 (1); †Oct. 1 (2); *Dec. 3 (1); *Jan. 7 (1); ‡Jan. 21 (2); †Mar. 18 (2); *May 13 (1).

Guilford—†Aug. 20 (1); *Sept. 17 (1); †Oct. 22 (2); *Dec. 10 (1); †Dec. 31 (1); †Jan. 14 (1); †Feb. 11 (2); *Feb. 25 (1); *Apr. 1 (1); †Apr. 15 (2); †June 3 (2); *June 17 (1).

Granville—July 30 (1); Nov. 19 (2); Feb. 4 (1); Apr. 29 (2).

Alamance—Sept. 3 (2); *Nov. 5 (1); Mar. 4 (1); †May 27 (1).

Orange—Aug. 6 (1); Oct. 15 (1); Mar. 11 (1); †May 20 (1).

Person—Aug. 13 (1); Nov. 12 (1); Apr. 8 (1).

TENTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge G. S. Ferguson.

SPRING TERM, 1907—Judge Fred. Moore.

Montgomery—Sept. 17 (2); *Jan. 21 (1); †Apr. 15 (1).

Iredell—July 30 (2); Oct. 29 (2); Jan. 28 (2); May 20 (2).

Rowan—Aug. 27 (2); Nov. 19 (2); Feb. 11 (2); May 6 (2).

Davidson—Aug. 13 (2); †Nov. 12 (1); Feb. 25 (2); †Apr. 22 (1).

Stanly—*July 9 (1); †Sept. 10 (1); *Jan. 14 (1); †Mar. 11 (1).

Randolph—July 16 (2); Dec. 3 (2); Mar. 18 (2).

Davie—Oct. 1 (2); Apr. 1 (2).

Yadkin—Oct. 15 (2); Apr. 29 (1).

ELEVENTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge Geo. W. Ward.

SPRING TERM, 1907—Judge G. S. Ferguson.

Ashe—Oct. 22 (2); Jan. 21 (2); May 27 (2).

Forsyth—*July 23 (1); †Sept. 10 (2); *Oct. 8 (1); †Dec. 3 (2); *Feb. 11 (2); †Mar. 11 (2); May 20 (2).

Rockingham—*July 30 (1); Nov. 5 (2); Feb. 25 (2); †June 10 (2).

Alleghany—Aug. 20 (1); Mar. 25 (1).

Caswell—Oct. 15 (1); Apr. 15 (1).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

Surry—†Aug. 27 (2); Nov. 19 '2); Feb. 4 (1); Apr. 22 (1).
Stokes—Sept. 24 (2); May 6 (2).

TWELFTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge R. B. Peebles.
SPRING TERM, 1907—Judge Geo. W. Ward.
Mecklenburg—†July 16 (2); *Aug. 13 (2); *Sept. 24 (1); †Oct. 1 (3); †Nov. 26 (1); *Dec. 3 (1); †Jan. 14 (2); *Feb. 11 (2); †Mar. 11 (2); *Apr. 22 (1); †Apr. 29 (1); *June 3 (1); †June 10 (1).
Cleveland—July 30 (2); Nov. 5 (2); Mar. 25 (2).
Gaston—Sept. 10 (2); Nov. 19 (1); Feb. 25 (2); May 20 (2).
Lincoln—Sept. 3 (1); Dec. 10 (1); Apr. 8 (1).
Cabarrus—Aug. 27 (1); Oct. 22 (2); Jan. 28 (2); May 6 (2).

THIRTEENTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge H. R. Bryan.
SPRING TERM, 1907—Judge R. B. Peebles.
Wilkes—*Aug. 20 (1); †Oct. 8 (2); *Mar. 4 (1); †June 17 (1).
Catawba—July 9 (2); Oct. 29 (2); Feb. 4 (2); †May 6 (2).
Alexander—Oct. 1 (1); Feb. 18 (1).
Caldwell—*Sept. 17 (2); †Nov. 26 (2); Feb. 25 (1).
Mitchell—Nov. 12 (2); May 20 (2).
Watauga—Aug. 6 (2); Mar. 25 (2); June 17 (2).

FOURTEENTH JUDICIAL DISTRICT.

FALL TERM 1906—Judge Charles M. Cooke.
SPRING TERM, 1906—Judge H. R. Bryan.
Yancey—Sept. 3 (2); Mar. 25 (2); †June 17 (1).
McDowell—July 23 (2); Sept. 17 (2); †Jan. 21 (2); Feb. 18 (2).
Henderson—*Oct. 1 (2); ‡Nov. 12 (2); *Mar. 4 (1); ‡May 13 (2).
Rutherford—†Aug. 20 (2); Oct. 29 (2); †Feb. 4 (2); Apr. 8 (2).
Polk—Oct. 15 (2); Apr. 22 (2).
Burke—Aug. 6 (2); †Dec. 3 (2); Mar. 11 (2); †June 3 (2).

FIFTEENTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge Oliver H. Allen.
SPRING TERM, 1907—Judge C. M. Cooke.
Buncombe—July 30 (2); †Sept. 10 (6); Nov. 12 (2); †Dec. 3 (2); Feb. 4 (3); †Mar. 11 (4); Apr. 22 (2); †May 27 (4).
Madison—*Aug. 13 (2); †Oct. 22 (2); †Jan. 21 (2); *Feb. 25 (2); †May 6 (2).
Transylvania—Aug. 27 (2); Nov. 26 (1); Apr. 8 (2).

SIXTEENTH JUDICIAL DISTRICT.

FALL TERM, 1906—Judge W. R. Allen.
SPRING TERM, 1907—Judge O. H. Allen.
Haywood—July 9 (2); Sept. 24 (2); Jan. 28 (3).
Jackson—Oct. 8 (2); Feb. 18 (2); †May 20 (2).
Swain—July 23 (2); Oct. 22 (2); Mar. 4 (2).
Graham—Sept. 3 (2); Mar. 18 (2).
Cherokee—Aug. 6 (2); Nov. 5 (2); Apr. 1 (2).
Clay—Sept. 17 (1); Apr. 15 (1).
Macon—Nov. 19 (2); Apr. 22 (2).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA.

CIRCUIT COURT.

JETER C. PRITCHARD, Judge, Asheville, N. C.

DISTRICT COURTS.

EASTERN DISTRICT, Thomas R. Purnell, Judge, Raleigh.
WESTERN DISTRICT, James E. Boyd, Judge, Greensboro.

UNITED STATES CIRCUIT COURT.

Terms.—Wilmington, first Monday after fourth Monday in April and October
Raleigh, fourth Monday in May and first Monday in December.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT.

Terms.—Elizabeth City, third Monday in April and October.
New Bern, fourth Monday in April and October.
Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

OFFICERS.

Harry Skinner, United States District Attorney, Raleigh.
J. A. Giles, Assistant United States District Attorney, Durham.
Claudius Dockery, United States Marshal, Raleigh.
H. L. Grant, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Goldsboro.
Samuel P. Collier, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Wilmington.

DEPUTY CLERKS.

George L. Tonnoffski, Raleigh.
James K. Collier, Wilmington.
George Green, New Bern.
John P. Overman, Elizabeth City.

WESTERN DISTRICT.

Terms.—Circuit and District terms are held at the same time and place, as follows:
Greensboro, first Monday in April and October, Samuel L. Trogden, Clerk.
Statesville, third Monday in April and October, H. C. Cowles, Clerk.
Asheville, first Monday in May and November, W. S. Hyams, Clerk.
Charlotte, second Monday in June and December, H. C. Cowles, Clerk.

A. E. Holton, United States District Attorney, Winston.
A. H. Price, Assistant United States District Attorney, Salisbury.
J. M. Milliken, United States Marshal, Greensboro.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

FALL TERM, 1905.

WRIGHT v. COTTEN.

(Filed November 15, 1905).

Bankruptcy — Action by Trustee — Issues — Preference — Fraud as Element — Payment of Money — Transfer of Property—Creditor's Knowledge of Preference—Agent's Knowledge.

1. Issues arise upon the pleadings and not upon evidential facts. All that is requisite is that the court shall submit issues in such form as, when answered either way, may be the basis for its judgment.

2. A payment of money is a transfer of property under the definition of the word "transfer" as used in the bankrupt act.

3. To make a transfer voidable within the provisions of the bankrupt act, it is necessary to establish: (1) The insolvency of the transferrer. (2) The obtaining by the creditor of a larger percentage of his debt than any other creditor of the same class. (3) The giving of a preference within four months before the filing of a petition in bankruptcy. (4) Reasonable cause upon the part of the creditor to believe that a preference was intended.

4. The creditor must have reasonable cause to believe the debtor insolvent in fact, as a foundation for reasonable cause to believe that an unlawful preference was intended.

5. Where it is established that debtor at the time of the alleged preferential payment to his father, was the latter's general financial agent, and that he practically paid himself for his father, it follows that his personal knowledge of his own utter insolvency is imputable to his principal and that the father is affected by all knowledge possessed by his son, his agent.

6. In an action by a trustee in bankruptcy to recover an unlawful preference, it is not necessary for a plaintiff to show a fraudulent intent upon the part of the creditor, or that the latter did not give a present fair consideration for the transfer.

7. Where the agent of the creditor had reasonable cause at the time to believe the debtor insolvent, and knew that the transaction was in fraud of the bankruptcy law, it is the same as if the creditor himself had taken part therein, with the same cause to believe and the same knowledge.

ACTION by J. C. Wright, Trustee in Bankruptcy of C. L. Cotten, against J. F. Cotten, heard by *Judge Henry R. Bryan* and a jury, at the March Term, 1905, of the Superior Court of STANLY.

The following issues were submitted:

1. Was the payment by the bankrupt, C. L. Cotten, of $3,000 to his father, John F. Cotten, made with the intent and purpose on the part of C. L. Cotten to hinder, delay or defraud his creditors or any of them? Ans. Yes.

2. Did John F. Cotten, the defendant, receive or purchase in good faith, the $3,000 for a present, fair consideration? Ans. No.

3. Did C. L. Cotten, bankrupt, while insolvent and within four months before the filing of the petition in bankruptcy against him, pay to his father, John F. Cotten, or his agent, acting in the matter for him, $3,000? Ans. Yes.

4. If so, did the person receiving the payment of the defendant Cotten, or his agent acting in the matter for him, have reasonable cause to believe that the bankrupt, C. L. Cotten, intended by said payment to prefer his father over other creditors, as alleged in the complaint? Ans. Yes.

5. What sum, if any, is the plaintiff entitled to recover of the defendant? Ans. $3,000 with interest.

From the judgment rendered, the defendant appealed.

John N. Wilson and *King & Kimball* for the plaintiff.
Theo. F. Kluttz and *J. R. Price* for the defendant.

BROWN, J. The plaintiff sues to recover $3,000 which he alleges that C. L. Cotten, a bankrupt at the time insolvent, and within four months of the filing of the petition in bankruptcy against him, paid to John F. Cotten, his father, in money, and that at the time John F. Cotten had knowledge that C. L. Cotten was insolvent, and intended thereby to give him an unlawful preference and that his purpose in making said payment was to hinder, delay and defraud his creditors. The defendant, administrator of John F. Cotten, denied the several material allegations of the complaint, but admitted that the $3,000 was paid to John F. Cotten by C. L. Cotten in payment of a debt, and within the four months as alleged.

The evidence discloses the following uncontradicted facts: On March 27, 1901, the bankrupt's store at Albemarle was destroyed by fire. His goods were insured in the sum of $8,000—$2,000 in the North Carolina Home, $4,000 in the Traders' Ins. Co., and $2,000 in the Virginia State. On February 21, 1902, he compromised the policy in the North Carolina Home for $1,000 cash. On February 13, previous, his attorney compromised the $4,000 Traders' policy and received $2,500. The attorney retained $500 for services and paid the bankrupt $2,000, which money or check for the same he deposited in the Cabarrus Savings Bank, of Albemarle, on February 19, 1902, to the credit of John F. Cotten, and in his name. The cash the bankrupt received from the North Carolina Home he deposited in the Davis-Wiley Bank, Salisbury, on February 22, 1902, in the name of and to the credit of John F. Cotten. On April 7 an involuntary petition in

bankruptcy was filed, and on April 25 he was adjudged a bankrupt and the plaintiff elected trustee in bankruptcy.

There are several exceptions appearing in the record, which we have carefully examined, but deem it unnecessary to notice except to say that they are without merit.

The only exceptions we desire to notice more at length are those relating to the issues and the burden of proof. We think the issues submitted are more than sufficient to develop the whole case and give plaintiff and defendant full scope to present to the jury evidence upon every issue raised by the pleadings. Issues arise upon the pleadings and not upon evidential facts. All that is requisite is that the court shall submit issues in such form as when answered either way may be the basis for its judgment. *Cumming v. Barber,* 99 N. C., 332. In his very able argument, as well as in his brief, Mr. Kluttz, counsel for defendant, laid almost entire stress upon the alleged errors of the trial judge in charging upon the burden of proof in respect to the first and fourth issues. In the view we take of this case it is unnecessary to consider the charge in detail in reference to the issues. The Bankrupt Act defines a preference, section 60, (a) to consist in the payment by a debtor to one creditor of a greater percentage of his debt than he is able to pay to all other creditors of the same class, and (b) the same section denounces the penalty imposed on the giving of a preference to be that if such preference has been made, and the person receiving it or his agent acting in the matter for him had reasonable cause to believe that a preference was intended, then the same is voidable and made recoverable by the trustee.

From the reading of these sections it is clear that the making of the preference and incurring its penalty are wholly independent of any idea of fraud whatever—the statutes simply saying in plain terms what a preference is, and in terms equally plain the penalty of it.

A payment of money is a transfer of property under the

definition of the word "transfer" as used in the sections of the Bankrupt Act. *Picie v. Trust Co.,* 182 U. S., 438; *In re Fixen,* 50 L. R. A., 605; *Sherman v. Luchart,* 70 S. W., 388. To make a transfer voidable within the provisions of the act, it is necessary to establish four facts:

1. The insolvency of the transferrer.

2. The obtaining by the creditor of a larger percentage of his debt than any other creditor of the same class.

3. The giving of a preference within four months before the filing of a petition in bankruptcy.

4. Reasonable cause upon the part of the creditor to believe that a preference was intended. *Sebring v. Wellington,* 63 N. Y. App. Div., 498.

We think His Honor should have instructed the jury upon the entire evidence, and in any reasonable view of it, if found to be true, that the plaintiff is entitled to recover the $3,000, and that they should answer the issues, as the jury did answer them. The jury having found all the issues in favor of the plaintiff thereby declared that they found the facts to be as testified to by the witnesses, inasmuch as the defendant offered nothing in contradiction. The uncontradicted evidence establishes each of the four essential facts necessary to a recovery, and we do not see that any other inferences can be reasonably drawn from it.

The insolvency of the bankrupt at the time he made the alleged payment is an irresistible conclusion from the evidence. His indebtedness amounted to from $12,000 to $16,000, and his assets, "exclusive of property transferred or conveyed in fraud of creditors," amounted to $13,000. Hence it follows that the admitted payment of the $3,000 within the four months was a much larger percentage of John F. Cotten's debt than could be paid any other creditor of the same class.

This brings us to consider the fourth essential fact. We admit as broadly as the defendant contends for, that the cred-

itor must have reasonable cause to believe the debtor insolvent in fact, as a foundation for reasonable cause to believe that an unlawful preference was intended. *In re Eggert,* 3 Am. Bank. Rep., 541; *Grant v. Bank,* 97 U. S., 80. We think the uncontradicted and unexplained evidence establishes that at the time of and before the preferential payment, C. L. Cotten, the bankrupt, was the general confidential financial agent of his father, John F. Cotten, and that he practically made such payment to himself as his father's agent. The testimony of several witnesses tends to prove conclusively that for some time prior to his failure, C. L. Cotten had charge of all the business of John F. Cotten, in Albemarle; that he was his financial agent there; that people generally transacted business with C. L. Cotten for John F. Cotten, and that he collected and paid out money for his father. The evidence shows that C. L. Cotten had control of the bank account of John F. Cotten from 1900 till the later's death; that he drew checks against it and signed them "John F. Cotten, by C. L. Cotten," and that such checks were paid by the bank. The officers of the bank recognized him and did business with him for several years, and at the time when the payment was made, as the generally accredited financial agent of John F. Cotten. In fact, C. L. Cotten drew on this very insurance money, deposited to his father's credit by such checks, and they were always honored. A review of the entire evidence tending to prove the agency is unnecessary and would be tedious. Suffice it to say, it establishes the agency most conclusively, and there is nothing to contradict it. The only witness offered by the defendant was the daughter of John F. Cotten, whose evidence tended to contradict nothing and to prove no material fact, except that John F. Cotten learned speedily of the fire which destroyed his son's property.

It being established that C. L. Cotten, at the time of the payment, was his father's general financial agent and that he practically paid himself for his father, it follows that his per-

sonal knowledge of his own utter insolvency is imputable to his principal, and that the father is affected by all knowledge possessed by the son, his agent.

It is not necessary for the plaintiff to show a fraudulent intent upon the part of John F. Cotten or that John F. Cotten did not give a present fair consideration for the $3,000. Therefore the first and second issues were unnecessary, although found for the plaintiff. The two vital issues are the third and fourth. If the effect of this transaction is to give John F. Cotten a greater percentage of his debt than others of the same class get, it is voidable and the money may be recovered, provided John F. Cotten had reasonable cause to believe that it was intended as a preference. *Crooks v. Bank,* 2 Am. Bankrupt Cases, 243; *Blakey v. Bank, ibid.*, 459.

There is no evidence that John F. Cotten personally knew of or participated in this transaction. His son, who acted in the dual relation of debtor and general financial agent, did all that was done. In his capacity as financial agent he received the money for his father from himself, as debtor, and as agent checked on it and paid it out. This agent-debtor, C. L. Cotten, evidently knew he was hoplessly insolvent, and he therefore hurried to compromise his insurance policy and deposited the proceeds to his father's credit, and thereby gave him an unlawful preference over the other creditors. No other inference can be reasonably drawn from the uncontradicted evidence.

It is an old and well established rule that the principal is bound by any notice acquired by his agent during the course of the agency. It is a familiar maxim of the law that "notice to the agent is notice to the principal." Reinhard on Agency, sec. 354.

This rule of constructive notice to the principal is based upon the identity of principal and agent, and upon the theory that the agent has discharged his duty by giving information to his principal.

Therefore, it is held that where the agent had reasonable cause at the time to believe the debtor insolvent, and knew that the transaction was in fraud of the bankrupt law, it is the same as if the creditor had himself taken part therein, with the same cause to believe and the same knowledge. *Sage v. Wyncoop,* 21 Fed. Cases, 147; s. c., 104 U. S., 319; *Rogers v. Palmer,* 102 U. S., 263; Collier on Bankruptcy, 425. The authorities are uniform and abundant that any knowledge possessed by the agent of the creditor may be imputed to the latter.

We thus see that every essential element of proof necessary to a recovery is disclosed by the uncontradicted evidence. No counter proof was offered and no explanation, and, as but one inference can reasonably be drawn from all the evidence, the court would have been justified in instructing the jury that in any view of the evidence, if the jury found it to be true, the plaintiff is entitled to recover the $3,000.

Affirmed.

HILL v. DALTON.

(Filed November 15, 1905).

Processioning—Burden of Proof — Deeds — Boundaries — Natural Object—Course and Distance—Title—Location of Grants—Evidence—Declarations as to Boundaries.

1. In a proceeding under the "Processioning Act," chapter 22, Laws 1893, to establish a disputed line, the burden of proof is upon the plaintiff.

2. Whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance specified.

3. Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land.

4. In a processioning proceeding the plaintiff may not, where there is a call for course and distance and a natural object or line of another tract, stop at the end of the call for course and distance, but must either show the location of the natural object or the line called for, or show that at the time his line was surveyed, a line was run and a corner marked corresponding with the call for course and distance, or that there was never any such object or line, as called for.

5. The question of title is not in issue in a proceeding for processioning for establishing a disputed line.

6. In a processioning proceeding, where the question in controversy was the location of the R grant, and to do this it was necessary to locate the M grant, evidence to show that the latter was not properly located because it did not correspond with the former, was properly excluded, as the lines of the senior grant, the controlling object, cannot be established by the lines of the junior grant.

7. The declaration of a person deceased, at the time of the trial, in regard to a corner or line in controversy, is competent, provided the declarant had opportunity of knowing, had no interest in making the declaration at the time and that it was *ante litem motam.*

HILL v. DALTON.

PROCEEDING by J. H. Hill against Thornton Dalton and others, brought before the Clerk of the Superior Court and heard upon appeal by *Judge Chas. M. Cooke* and a jury, at the March Term, 1905, of the Superior Court of FORSYTH. From a judgment for the defendants, the plaintiff appealed.

Manly & Hendren and *Watson & Buxton* for the plaintiff.
Lindsay Patterson for the defendants.

CONNOR, J. This is a proceeding instituted pursuant to the provisions of chapter 48 of The Code, as amended by chapter 22, Laws 1893, commonly known as "The Processioning Act." The case was before us on appeal at the Fall Term, 1904, reported in 136 N. C., 339. The proceeding was conducted through its several statutory stages until it reached the Superior Court, and was then tried upon a single issue directed to the inquiry in respect to the true line of plaintiff's land. It would be difficult to state the contentions upon which the exceptions to His Honor's rulings are based, without reference to the map which was in evidence.

Plaintiff introduced a grant to John Rights, bearing date January 14, 1795, describing a tract of 200 acres. "Beginning at a pine, Jacob Blum's corner, east with his line 57 chains to a white oak in James McKaughan's line, south 35 chains and 9 links crossing two branches to pointers in said McKaughan's line, west 57 chains to a stake, north 35 chains, 9 links to the beginning." Plaintiff introduced several deeds conveying said land, by the same description, until the title vested in A. D. McCumbie; he then showed mortgage deed from McCumbie to Belo, containing covenants of seizin, against encumbrances and general warranty; deed from Belo to plaintiff; all of said deeds containing same description. There was evidence, in respect to which there was no controversy, that the Rights grant began at the S. W. corner of the Jacob Blum grant located by the surveyor at a stone on the

map at A. It was also shown that the 57 chains in the first call gave out at B; that there was a small black gum at that point. Those defendants, claiming under the McKaughan grant, introduced a grant to James McKaughan bearing date November 9, 1784. This grant covered 460 acres. "Beginning at a pine on the west side of the creek, running north 93 chains to a pine, east 49½ chains to a black oak, south 93 chains to a pine, then west to the beginning." There was evidence tending to show the location of the grant as appears on the map, W Q N M. Plaintiff denied that the McKaughan grant was correctly located. There was evidence tending to sustain plaintiff's contention in this respect. Plaintiff insisted that he was not called upon to locate the McKaughan grant, although called for by the Rights grant; that as defendants claimed under the grant, the burden was upon them to locate it; that if they failed to do so, he was entitled to locate his land according to the course and distance, disregarding the objects called for. If plaintiff is correct in his contention, his true lines would be A, B, C, D, thence to the beginning. His Honor instructed the jury: "That the burden was on the plaintiff to establish the true boundary in dispute between the parties. That as the grant under which plaintiff claimed called from it beginning point east 57 chains to McKaughan's line, the burden was on the plaintiff to establish by a preponderance of the evidence the true boundary line of the McKaughan grant." The court stated the same proposition in other forms and declined to give an instruction asked by plaintiff, putting the burden upon the defendant. Plaintiff's exceptions present the question whether there was error in the instruction given and in refusing that asked. Upon the former appeal this question was not presented or argued. We did not otherwise decide it than to say: "As the plaintiff is the actor, it would seem that the burden is on him to make good his contention." As the question is now fairly presented and has been argued, we

deem it proper to treat it as open and endeavor to lay down the rule for guidance in like cases in the future. In those cases which have been before this court involving the construction of the statute, we do not find any expression of opinion regarding the rule of practice in this respect. The proposition, that the party holding the affirmative of the issue carries the laboring oar, or has the burden of making good his allegation, is elementary. He meets this requirement by introducing testimony, which the court deems sufficient to take the case to the jury. He may, in certain cases, after the introduction of testimony, rely upon any presumption which the law raises and which becomes evidence from which, unless rebutted, he may call for a verdict. These principles are all of common knowledge and illustrated in practice by numerous cases in our reports. The only question is the extent and manner of their application to this unique proceeding with which we are dealing. In the absence of any authority, courts are compelled to resort to "the reason of the thing." It is impracticable, if not impossible, to try and determine controversies of fact without adopting some principle or rule for determining which of the parties shall first produce testimony, or, in the language of the books, "go forward." 1 Greenleaf, sec. 14; Thayer on Ev., 353. If no evidence has been produced, it is clear that the court would have instructed the jury to find the issue against the plaintiff, that is, that he had not established his line. It behooved him, if he would persuade the jury to find the fact to be as alleged, to introduce evidence. Therefore, in the ordinary acceptance of the term, and, as generally understood in practice, the burden of proof was upon him. We see no reason why the general rule should not apply in a proceeding instituted to establish a disputed line. The plaintiff says, conceding this to be true, he was only required to locate his land according to the calls in his grant; that he was entitled to have the lines called for in the absence of any evidence on the

part of the defendant, declared to be the true line. Upon this contention the enquiry arises, what is necessary for the plaintiff to show to locate his grant. He says, that having shown the beginning point to be at A, he may locate according to the calls by course and distance. This presents the question, what are the calls in the grant, and thus we reach the real question raised by His Honor's charge and the exception thereto. His Honor's opinion was that the controlling call in the first and second line is the McKaughan grant. In *Cherry v. Slade,* 7 N. C., 82, *Chief Justice Taylor* examined the cases decided prior to 1819 and carefully reviews them in an able and exhaustive opinion. He discusses the history and reasons upon which the court had proceeded in questions of boundary where there is a variance between the calls for course and distance and natural objects or lines of other tracts of land. Without undertaking to do more than refer to this "mine of learning," we find that the rules there announced have been uniformly followed by this court. "That whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance specified. The course and distance may be incorrect from any one of the numerous causes likely to generate error on such a subject; but a natural object is fixed and permanent, and its being called for in the deed or patent, marks beyond controversy the intention of the party to select that land from the unappropriated mass." There is a second rule which makes an exception to the first. "Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land." The rule is stated in *Gilchrist v. McLaughlin,* 29 N. C., 310: "When another line is called for and distance gives out before reaching the line called for, the distance is to be disregarded." *Jefferson v. McGhee,* 34

N. C., 332. In *Corn v. McCrary*, 48 N. C., 496, it is said that the line of another tract controls course and distance, and it makes no difference whether such line be marked or unmarked. *Nash v. R. Co.*, 67 N. C., 413; *Dickson v. Wilson*, 82 N. C., 487. When the plaintiff introduced the John Rights grant it was incumbent upon him to locate it in accordance with the controlling calls. When it appeared by the evidence of the surveyor that at the end of an east line of 57 chains there was no white oak, or line of the McKaughan grant, it behooved him to go further and show either where the McKaughan line was or that the line relied on by him was surveyed, marked, and the corner marked at the end of the call. In the absence of any testimony in either respect he had failed to locate his grant or establish his line, that being the matter in controversy. This may not be true in actions of a strictly adversary nature involving title. In such cases the plaintiff is ordinarily required only to make out a *prima facie* case, but here the plaintiff, actor, has undertaken to establish the true location of his line. We are of the opinion, in this proceeding, that he may not, where there is a call for course and distance and a natural object or line of another tract, stop at the end of the call for course and distance, but must either show the location of the natural object or the line called for, or show that at the time his line was surveyed a line was run and a corner marked corresponding with the call for course and distance, or that there was never any such object or line, as called for. The question of title is not in issue in this proceeding. We confine our ruling to a proceeding for processioning for establishing a disputed line. The objective and controlling point in the location of the Rights patent is the white oak in the McKaughan grant, and until that is ascertained, the plaintiff cannot ask the jury to find his true line as he contends. The defendants having shown the McKaughan grant and introduced evidence in regard to its location, the inquiry was narrowed to the single question whether

such evidence was to be accepted by the jury as true. In considering the evidence, it was necessary for the court to instruct them in respect to the burden of proof. If they believed the defendant's evidence in this respect, the plaintiff could not further proceed but for the rule that they would disregard the course and distance, and carry his first call to the nearest point in the grant. If they did not believe the evidence, the plaintiff had failed to locate his grant, and the jury would have been compelled to find that they could not locate his true line. The same result would follow if the evidence was so balanced that they could not say how the matter was. The law declares the McKaughan grant to be his boundary—the burden was upon him to show where it was. We concur with His Honor's instruction. The jury followed the call as far as possible, and then made such deflections as was necessary to carry them to the McKaughan grant. An examination of the plats set out in several of the cases in our reports show a much more radical departure from the course and distance to reach the natural object or line called for. The jury reached the McKaughan grant at 6, and ran back to 5, in this way answering the second call along the McKaughan line, a line from B to C would not, according to the location of the McKaughan grant, have met this call.

The plaintiff proposed to ask the surveyor: "If the true location of the McKaughan grant is, as appears on the map, W Q M N, would the first call of the Rights grant—the beginning point being established at A—ever reach any line of the McKaughan grant?" Upon objection the question was excluded. The plaintiff stated that his purpose in asking the question was to show that the first line of the Rights grant, if extended, would not strike the line of the McKaughan grant anywhere, and therefore the McKaughan grant was not properly located. This inquiry presents the question, in another aspect, passed upon in this case in the former appeal. The question in controversy was the location of the Rights

grant—to do this it was necessary to locate the McKaughan grant—the proposition was to show that the latter was not properly located because it did not correspond with the former. If permitted it would be to establish the lines of the senior grant, the controlling object, by the lines of a junior grant, the very object which was controlled by the senior. The fact that the course and distance called for in the junior grant did not reach the line of the senior grant, was no evidence of the location of the latter. This would be to reverse the rule by having the junior grant, the location of which is the matter in controversy, to control the location of the senior. For the reasons given, and upon the authority cited in the former opinion, we sustain His Honor's ruling.

Plaintiff testified that after he purchased, McCumbie pointed out the corner of the land. He was then asked, "What corners did he point out to you?" Objection by defendant sustained, and plaintiff excepted. McCumbie was dead at time of the trial. It is abundantly settled in this State that the declarations of a person deceased, at the time of the trial, in regard to a corner or line in controversy, is competent, provided the declarant had opportunity of knowing, had no interest in making the declaration at the time and that it was *ante litem motam*. In *Sasser v. Herring*, 14 N. C., 340, the rule is stated, and in *Yow v. Hamilton*, 136 N. C., 357, *Mr. Justice Walker* restates it in the light of all of the decisions of this court, which are cited and the language of several of them quoted and commented upon. It is needless to do more than refer to that well considered opinion. That the admission of the declaration of a single person under the limitations prescribed is an exception to the general rule is conceded. It is also said that the concession made by the court, in this respect, was largely due to the peculiar condition existing in the early settlement of our State. It would seem that the reason of the rule suggests that it should not be extended beyond its original scope. The plaintiff

did not bring himself within the well defined limitations upon which such declarations are admissible. There is nothing in the record to show or indicate whether the declaration if made was *ante litem motam*. Before the declaration in any aspect was admissible, the plaintiff should have brought it within the well defined limitations—in respect to time, interest, death and knowledge of the declarant. It is not clear that the declaration is not incompetent for another reason. There is no difficulty in saying, as a matter of law, *what* the boundaries of the Rights grant are. The only difficulty is in saying *where* they are. There is but one way in which the plaintiff can avoid the rule which carries his first line to the McKaughan grant, by showing that at the time the line was surveyed, it was marked and the corner marked. To show the declaration of a deceased owner otherwise competent as to the corners of the Rights land, would be but slight, if any, evidence of the McKaughan grant. *Caraway v. Chancy,* 51 N. C., 361; *Roberts v. Preston,* 100 N. C., 243. We have examined the record with care and find no error in His Honor's ruling. The judgment must be

Affirmed.

BUNKER v. BUNKER.

(Filed November 15, 1905).

Judgments—Estoppel—Accounting — Exceptions — Appeal —Practice.

1. A judgment is an estoppel as to the issues raised by the pleadings, and which could be determined in that action and not only as to those actually named in the judgment.

2. This doctrine of estoppel does not extend to any matters which might have been brought into the litigation, or any cause of action which the plaintiff might have joined, but which in fact is neither joined nor embraced by the pleadings.

3. In an action for an accounting where it is alleged that a certain item of costs in another action was a proper charge against the defendant, and was first allowed by the referee and afterwards omitted from his account reported in obedience to an order requiring a new account to be taken and stated, to which omission plaintiff excepted and thereafter a final judgment was rendered which did not in terms include this allowance, but provided on the contrary that plaintiff should recover a certain sum and the costs of action, which necessarily excluded from the judgment the recovery of said certain item of costs, *held*, that the court erred at a subsequent term in ordering the case reinstated on the docket for further proceedings where there was no exception to the judgment and no appeal taken therefrom.

4. A judgment is final which decides the case upon its merits, without any reservation for other and future directions of the court, so that it is not necessary to bring the case again before the court.

5. Where in an action for an accounting by the terms of the judgment (which was final and to which there was no exception) the account was closed to the day of its rendition, no other or further accounting could be ordered in respect to matters not included in that suit, but such relief must be sought in a new and independent action.

6. Where a final judgment was rendered and no exception was entered and no appeal taken, but the amount recovered and the costs were paid, the vitality of that suit and the judgment therein was fully spent and the latter cannot be re-opened and the suit revived by any sort of proceeding known to the law.

BUNKER *v.* BUNKER.

ACTION by C. W. Bunker against Adelaide Bunker and another, heard by *Judge O. H. Allen,* upon the original papers, at the August Term, 1904, of the Superior Court of SURRY.

Plaintiff, C. W. Bunker, in behalf of himself and as administrator with the will annexed of his father, Chang Bunker, and as guardian of Hattie Bunker, another child, brought this action against the defendant, Adelaide Bunker, widow of Chang Bunker, for a construction of his will and an accounting in respect to certain rents and profits received from the lands devised to her and others in her husband's will. Her co-defendants are the other children of the testator and the husbands of those who are married. The clause of the will in question provided that, if the rents and profits of his lands should be more than is necessary for the support of his "single and infant children and his wife," the residue should be equally divided among all his children. The court, at August Term, 1886, construed the will and ordered a reference to R. S. Folger to take and state an account of rents and profits in the hands of the defendant, Adelaide Bunker, and to ascertain and report the residue, if any, going to the children. The referee reported and, among other items of the account, charged the said defendant with the sum of $525.15, amount of costs paid in the suit of *Jones v. Bunker,* concerning a part of the land, and interest on the same, $367.68. Defendant, Adelaide Bunker, excepted to this charge; the court (*Judge Boykin* presiding), at the Spring Term, 1893, overruled this exception and, having sustained certain other exceptions of the said defendant, recommitted the case, with directions to the referee, to the end that the account might be correctly taken and the true balance ascertained according to law. A new account was taken and stated by the referee and reported to the court. In this account, the said defendant was again charged with the costs paid by C. W. Bunker in the suit of *Jones v. Bunker,* to be paid out of

the rents and profits of the land. To this there was no exception, but exceptions were filed to other items, and at the hearing, Fall Term, 1895, the court having considered the exceptions, and concluding that the account had been taken on a wrong principle, set it aside and ordered a new account to be taken in accordance with the directions then given. The referee reported and in the account stated by him failed to charge, or to make any reference to, the item of cost in the suit of *Jones v. Bunker*. Among other exceptions of plaintiffs to this report, not necessary to be stated, was the following: That the referee failed to find the amount, $525.15, paid by C. W. Bunker, as costs in the case of *Jones v. Bunker,* with interest on the same, as heretofore found by the referee to be due C. W. Bunker, to be a first lien on said estate or to be first paid out of the rents and profits of the land described in the pleadings in this case. At the November Term, 1900, the court (*Judge Timberlake* presiding), after sustaining one of defendant's exceptions to the report and overruling others, and after overruling all of plaintiff's exceptions, including, of course, the one as to the costs in the suit of *Jones v. Bunker,* "adjudged that the heirs at law of Chang Bunker (plaintiffs and defendants, who are named in the judgment), recover the sum of $801.51 with interest thereon from the date of the payment and also the costs of the case to be taxed by the clerk." There was no exception to this judgment and no appeal therefrom. The case disappeared from the trial docket and was transferred to the judgment docket. The amount of the judgment was fully paid, as counsel admitted in this court. At Fall Term, 1904, on motion of the plaintiffs, after notice, the court ordered the case to be reinstated for further proceedings. After reciting that, at Spring Term, 1893, the plaintiff had been allowed by the court, upon the report of the referee, the amount of the costs in *Jones v. Bunker*, and that there had been no return or report of rents and profits by defendant Adelaide Bunker since

1897, the court ordered a reference for the purpose of having taken and stated an account of rents and profits since that time and directed that the amount of the costs in *Jones v. Bunker,* so allowed by the referee and court at a former term, be paid out of any surplus of rents and profits. The defendants excepted to this order and appealed, for the following reasons among others: 1. That the order is not supported by the record. 2. That the order reinstating the cause is erroneous, the judgment of *Judge Timberlake* being final. 3. That the order recommitting to a referee the claim of plaintiff, C. W. Bunker, for the costs in the suit of *Jones v. Bunker,* is erroneous, as this item was presented by the exceptions to the report heard before *Judge Timberlake,* and passed on by him and no exceptions were filed to his judgment.

Watson, Buxton & Watson for the plaintiffs.

Carter & Lewellyn and *Manly & Hendren* for the defendants.

WALKER, J., after stating the case: There were several important questions discussed in this case, but the only one we need consider is that which relates to the nature and legal effect of the judgment rendered at November Term, 1900, when *Judge Timberlake* presided. If it was a final judgment, the plaintiffs cannot be heard upon any matter which was litigated in the action and which was necessarily determined by it. In such a case, the matter in dispute having passed *in rem judicatam,* the former decision is conclusive between the parties, if either attempts, by commencing another action or proceeding, to re-open the question. This doctrine is but an outgrowth of the familiar maxim, that a man shall not be twice vexed for the same cause, and the other wholesome rule of the law that it is the interest of the State that there be an end of litigation and consequently a matter

of public concern that solemn adjudications of the courts should not be disturbed. Broom's Legal Maxims (8 Ed.), 330, 331. "If," says Lord Kenyon, "an action be brought and the merits of the question be discussed between the parties and a final judgment obtained by either, the parties are concluded and cannot canvass the same question in another action, although, perhaps, some objection or argument might have been urged upon the first trial, which would have led to a different judgment." *Greathead v. Bromley,* 7 Dunf. & East. (7 T. R.), 546. And again in another case, he says: "After a recovery by process of law there must be an end of litigation; if it were otherwise, there would be no security for any person, and great oppression might be done under the color and pretense of law." *Marriott v. Hampton,* 7 Dunf. & East., 269. "Good matter must be pleaded (or brought forward) in good form, in apt time and in due order, otherwise great advantage may be lost." Coke, 303b. If there be any one principle of law settled beyond all dispute it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatam,* and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever, and so it is, also, that if the plaintiff had an opportunity of recovering something in litigation formerly between him and his adversary, and but for the failure to bring it forward or to press it to a conclusion before the court, he might have recovered it in the original suit; whatever does not for that reason pass into and become a part of the adjudication of the court is forever lost to him. *U. S. v. Leffler,* 11 Peters, 101. *Judge Willes* thus states the rule: "Where the cause of action is the same and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action." *Nelson v. Couch,* 15 C. B. (N. S.), 108; (s. c., 109 E. C. L. R., 108). These principles have been fully adopted by us, as will appear in

the case of *Tyler v. Capeheart*, 125 N. C., 64, where the doctrine as to the plea of former judgment is concisely and accurately stated as follows: "The controverted point in that case (*Wagon Co. v. Byrd,* 119 N. C., 460), was whether a judgment was an estoppel as to the issues raised by the pleadings, and which could be determined in that action, or only as to those actually named in the judgment. The court held the former to be the rule settled by the reason of the thing and by the authorities. It was not held that where (as in the present case) other causes of action could have been joined the judgment was final as to them also. It was only intended to say that the cause of action embraced by the pleadings was determined by a judgment thereon, whether every point of such cause of action was actually decided by verdict and judgment or not. The determination of the action was held to be a decision of all the points raised therein, those not submitted to actual issue being deemed abandoned by the losing party, who did not except." And in *Wagon Co. v. Byrd, supra,* it is said: "The judgment is decisive of the point raised by the pleadings or which might properly be predicated upon them." The doctrine does not extend to any matter which might have been brought into the litigation, or any cause of action which the plaintiff might have joined, but which in fact was neither joined nor embraced by the pleadings. *Tyler v. Capeheart, supra.*

Applying the foregoing and familiar principle to our case, we find that the facts bring it clearly within its scope and influence, and certainly at least so far as the matter of costs in the suit of *Jones v. Bunker* is concerned. It was an item in the account originally and was properly considered by the referee as it is alleged in the complaint, and denied in the answers, that it is a proper charge against the said Adelaide Bunker, and should be paid out of the rents and profits of the land. It was at first allowed by the referee and after-

wards omitted from his account reported in obedience to an order requiring a new account to be taken and stated. To this omission plaintiffs excepted, and if it be conceded that the exception was directed only to the failure of the referee to charge the former allowance upon the rents and profits, and this seems to be so, it nevertheless appears that the plaintiffs permitted what is in form and substance a final judgment to be rendered, which did not in terms include this allowance, but provided on the contrary that plaintiffs should only recover a certain sum and the costs of the action, which necessarily excluded from the judgment the recovery of the costs paid in the suit of *Jones v. Bunker*. That this was a final judgment there can be no doubt. It possessed all of the elements and characteristics of such a judgment. It decided the case upon its merits, without any reservation for other and future directions of the court, so that it was not necessary to bring the case again before the court; and when it was pronounced, the cause was at an end and no further hearing could be had. *Flemming v. Roberts*, 84 N. C., 532; *McLaurin v. McLaurin*, 106 N. C., 331. All discussion of questions involved in that suit is shut out by the judgment. This ruling applies with equal force, we think, to the other branch of the order which required the referee to take an account of the rents and profits received since March, 1897. By the very terms of the judgment, the account was closed to the day of its rendition and no other or further accounting could be ordered in respect to matters not included in that suit. Such relief must be sought in a new and independent action.

The judgment was rendered at November Term, 1900. No exception was entered and no appeal taken, but the amount recovered and the costs were paid. When this was all done by and with the acquiescence of the plaintiffs, the vitality of that suit and of the judgment therein was fully spent and the latter could not be re-opened and the suit revived by any sort of proceeding known to the law.

The court erred in making the order and the case is remanded with directions to set it aside and to deny plaintiffs' motion.

Reversed.

LYLES v. CARBONATING CO.

(Filed November 22, 1905).

Res Ipsa Loquitur—Effect—Prayer for Instruction.

1. The doctrine of *res ipsa loquitur* does not dispense with the rule that he who alleges negligence must prove it. It is simply a mode of proving negligence and does not change the burden of proof.

2. An exception that the court failed to explain fully to the jury the doctrine of *res ipsa loquitur* cannot be sustained, where the appellant failed to hand up a prayer for instruction to that effect.

ACTION by Jarvis Lyles, Administrator, against Brannon Carbonating Co., for the alleged negligent killing of the plaintiff's son, Charles Lyles, heard by *Judge C. M. Cooke* and a jury, at the October Term, 1905, of the Superior Court of MECKLENBURG. The following issue was submitted: "Was the death of the plaintiff's intestate caused by the negligence of the defendant as alleged in the complaint?" The jury answered it, "no." From a judgment dismissing the action, the plaintiff appealed.

Stewart & McRae for the plaintiff.
Burwell & Cansler and *T. C. Guthrie* for the defendant.

BROWN, J. The evidence discloses that the plaintiff's intestate was killed by the explosion of a soda water tank made of copper and lined with block tin, which was being charged with gas at the bottling works of the defendant in Charlotte.

The tank did not belong to the defendant, but had been borrowed by it on the same day, and an hour or so before the explosion, from the Charlotte Drug Co., of which W. M. Wilson was the president, the loan having been made by said Wilson. No negligence is alleged in the complaint as to the manner of charging the tank or in respect to the actions of the servants of the defendant, upon whom devolved the duty of receiving, examining and charging the tank. The negligence alleged in the complaint consisted solely in using a defective tank.

There are several exceptions in the record relating to the admission and rejection of evidence. We have examined them carefully, and think they are without merit. Mr. McRae, the counsel for the plaintiff, in an able argument, rested his main contention upon two alleged errors in the charge of the court:

1. Because His Honor erred in instructing the jury that the burden of proof upon the issue was on the plaintiff.

2. Because His Honor in his charge failed to explain fully to the jury the doctrine of *res ipsa loquitur*.

It has never been decided in this State that where the principle of *res ipsa loquitur* applied, its effect was to shift the burden of proof upon the issue of negligence. In an action for damages for death by wrongful act, the burden is on the plaintiff upon the issues of negligence and damages (the only issues in this case), and if an accident happened out of the ordinary, our court has never said that this circumstance established the plaintiff's case and shifted the burden of proof upon the issue over to the defendant. In those cases where the doctrine is applied, this court regards it as purely evidential, and the inference to be drawn from the fact of the accident is some evidence which the court permits to go to the jury upon the question of negligence, and the plaintiff is not required to prove the actual facts showing the particulars wherein the defendant was negli-

gent, but there is no presumption raised whereby the burden of proof is shifted.

Res ipsa loquitur does not dispense with the rule that he who alleges negligence must prove it. It is simply a mode of proving negligence and does not change the burden of proof. Labatt Master & Servant, section 834; *Womble v. Grocery Co.*, 135 N. C., 481; *Stewart v. Carpet Co.*, 138 N. C., 67. In the latter case *Mr. Justice Walker* says: "The law attaches no special weight as proof to the fact of an accident, but holds it to be sufficient for the consideration of a jury, even in the absence of any additional evidence."

We think the jury had before them all the circumstances connected with the accident, and doubtless gave them such weight as they thought proper, and they seem to have drawn from the fact of an accident no inference of negligence.

As to the other contention of the plaintiff, we think it cannot be sustained. The doctrine that "the thing speaks for itself," relates solely to the evidence which may go to the jury as some proof of an alleged fact. It was therefore the plaintiff's duty, if he desired the court to charge upon this phase of the evidence more particularly, to hand up a prayer for instructions to that effect. This the plaintiff failed to do. He cannot now be heard to complain for the alleged omission of His Honor to charge upon that particular feature of the evidence, which the plaintiff himself did not regard of sufficient importance to call attention to by appropriate prayers for instruction.

The charge of the able and careful judge who presided in the court below has been closely examined. It appears to us to fully cover the controversy and to be a very clear and correct summing up of the contentions of the parties and the law applicable to the case. We find no error in it. The judgment is

Affirmed.

IN RE STEWART.

(Filed November 22, 1905).

Year's Allowance—Widow—Children Under 15 Years of Age.

In a proceeding for an allowment of year's allowance, under Revisal, sections 3091-5, the widow, who declined to take two children, by a former marriage, under 15 years of age, and keep them for one year and apply a portion of the money received as her allowance to their support, is entitled to only $300, and not an additional $100 for each of the children.

APPLICATION for year's allowance for Irene E. Stewart, widow of Frank P. Stewart, instituted before a justice of the peace. From the finding of the commissioners there was an appeal to the Superior Court, and from the ruling of the clerk an appeal was taken to the judge at term, and heard by *Judge Charles M. Cooke,* at May Term, 1905, of the Superior Court of STOKES.

The matter was heard upon an agreed statement of facts, of which the following are material to a decision of the case: Frank P. Stewart died testate on November 1, 1904, leaving an estate of the value of $3,490, all of which he bequeathed to Maud S. Haywood, his eldest child. W. W. Haywood, husband of the legatee, qualified as administrator *cum testamento annexo* on November 16, 1904, and took possession of the decedent's estate. At that time the widow, Irene Stewart, was ill at the home of her mother in Sampson County. On December 2, 1904, she dissented from the will of her husband, and on December 28 of the same year, applied for her year's allowance. At the time of the death of Frank P. Stewart, there lived with him two of his children by a former marriage, George B. and Frank P. Stewart, Jr., both under 15 years of age. While the widow was at the home of her mother, these two children were carried by the administrator to his home in

Charlotte, where they have since resided and now reside. On March 15, 1905, the administrator wrote to the widow proposing to pay her an allowance of $500, if she would take the children of her deceased husband and keep them for one year, which proposition she declined, and made application to a justice of the peace for the allotment of her year's support. The justice allowed her $500, and upon appeal to the clerk of the Superior Court, this allowance was affirmed. In the hearing before the clerk, W. W. Haywood, who had qualified as guardian of the two Stewart children, was made a party to this proceeding. Upon appeal from the ruling of the clerk to the judge in term, judgment was rendered reducing the widow's allowance to $300, and, by consent of the administrator and legatee, an allowance of $200 was made to the two children. The widow excepted to this judgment and appealed.

J. T. Morehead, W. P. Bynum, Jr., and *G. S. Ferguson, Jr.,* for the widow.

W. F. Harding for the administrator and guardian.

BROWN, J., after stating the facts: In this proceeding for the allotment of a widow's year's allowance, the appellant contends that she is entitled to receive $300 for herself and $100 for each of the children for her use and benefit. The appellee, administrator of the estate and guardian of the two members of the family of the deceased under the age of 15 years, contends on the other hand that inasmuch as the widow has declined to take the two children and keep them for one year and apply a portion of the money received as her allowance to their support, she is entitled to only $300 and not to an additional $100 for each of the children. We are of opinion that the contention of the appellee is right both upon reason and authority.

Statutes providing for the allotment of a portion of the

property of a deceased person for the support of the widow and family for one year have been in force in this State since 1796 (chap. 469). The Legislature of that year recognized the hardship of the laws then existing, whereby it was in the power of the administrator to expose to sale the whole crop and provisions of the deceased, and thereby deprive the widow of the means of subsistence for herself and family; and it was to prevent this hardship that they provided for the allotment to the widow of such part of the crop, stock and provisions as may be "necessary and adequate for the support of the widow and family for the space of one year." Under this act the amount of the allotment was determined by the number dependent upon it for support. The purpose of the act was to provide support for the widow and to enable her to keep her family about her until provision could be made for their final disposition.

Subsequent acts relating to this subject have not changed the original purpose of the Legislature in passing the act of 1796, but have merely made more definite the measure of the allotment, defined the word "family" as used in the act, and provided that in case there is no widow, or she dies before her allowance is allotted, there shall still be an allotment for the benefit of the members of the family surviving under the age of 15 years. This latter provision of our present statute (Rev. sec. 3094) apparently meets the objection to the former statute sustained in *Kimball v. Deming*, 27 N. C., 418, and subsequent cases, wherein it was held that the allowance was personal to the widow and could not be set apart for the members of the family if there was no widow, or if she died before the allotment. The latest expression of the Legislalature on this subject is contained in Revisal of 1905, sections 3091, 3092, 3093, 3094, and it is upon the construction of this statute that the case before us depends.

Section 3092 (similar to section 2118 of The Code) provides for an allowance of $300 to the widow and "one hun-

dred dollars in addition thereto for every member of the family besides the widow."

Section 3093 (Code, sec. 2119,) defines the "family" as "every person to whom the deceased or widow stood in place of a parent, who were residing with the deceased at his death and whose age did not then exceed 15 years."

"The object of this last clause," says the present *Chief Justice,* in *Hollomon v. Hollomon,* 125 N. C., 29, "was to exclude from the bounty children who might come in after such death to make themselves 'members of the family' and evidently was not meant to embrace those who, as in the present instance, cease as a consequence of the death to be members of the family and chargeable as such to the widow, for The Code, section 2116, says that the year's provision is 'for the support of herself and family.' The $300 is for her support. The additional $100 for each child under 15 years of age is not for her benefit, but to enable her to provide for such children, if any there be, who are members of the family. It would be 'sticking in the bark' indeed to take $200, which must come out of the property placed in the hands of the guardian for the support of these very children, and give it to the step-mother, who by the will is deprived of their custody and relieved of all expense of their support."

We can see no distinction between the *Hollomon case* and the case before us. The practical effect of the decision in that case is that membership in the family, which ceases upon the death of the father, cannot be made the basis for determining the amount of the widow's year's allowance, and the $100 designated by the statute as the amount allowed for each member of the family under 15 years of age must be used for their support.

The refusal of the widow to accept the children, in the present case, as members of her family and contribute to their support, operates as a bar to her right to the allowance of an additional $100 for each of them just as effectually as

if she had been deprived of their care by will. To permit her to use this money and refuse to contribute to the children's support would be a perversion of both the letter and spirit of the statute.

Affirmed.

CHEMICAL CO. v. LACKEY.

(Filed November 22, 1905).

Premature Appeal—Reference.

An appeal from an order of re-reference of a case to the referee to find a fact which the court deemed material, is premature and will be dismissed.

ACTION by Southern Chemical Company against C. A. Lackey and another, pending in the Superior Court of ALEXANDER, and heard by *Judge Jas. L. Webb* by consent, at Lenoir, upon the report of the referee and exceptions thereto. From an order of re-reference, the plaintiff appealed.

L. M. Swink for the plaintiff.

R. Z. Linney and *J. L. Gwaltney* for the defendants.

Per Curiam: Upon the hearing of the exceptions to the referee's report, the court ordered a re-reference to the referee to find a fact which the court deemed material. From this order the plaintiff appealed. The appeal is premature. Some things are settled and this is one of them. The appeal is dismissed. *Wallace v. Douglas,* 105 N. C., 42.

Appeal Dismissed.

LOWERY v. SCHOOL TRUSTEES.

(Filed November 22, 1905).

Legislature — Statutes — Constitutional Law — Graded Schools — Equal Facilities for Both Races — Separate Buildings — Public School System, Its Administration.

1. Every presumption is in favor of the validity of an act of the Legislature and all doubts are resolved in support of the act.

2. Courts never assume that the Legislature intended to pass an unconstitutional act—they may resort to an implication to sustain an act, but not to destroy it.

3. The act establishing a graded school in the town of Kernersville, is construed to contain a positive direction to establish one school in which the children of each race are to be taught in separate buildings and by separate teachers, as the Constitution commands.

4. When a duty is imposed and power conferred upon a public agency, by necessary implication, the duty and power to do the thing in the manner directed by the Constitution, attach.

5. The school district prescribed by the Act of 1905, (Pri.) chap. 11, must include both races, and the taxes levied and collected upon the property and polls of both races in the district must be applied to the support and maintenance of a graded school for the children of both races, and in carrying out the provisions of the act, the imperative mandate of the Constitution, that there shall be no discrimination in favor of, or to the prejudice of, either race must be observed.

6. If the general scope and purpose of a statute are constitutional, and constitutional means are provided for executing such general purposes, the entire statute will not be declared void, because some one or more of the details prescribed, or minor provisions incorporated, are not in accordance with the Constitution, provided such invalid parts may be eliminated without destroying or materially affecting the general purpose.

7. So much of section 7, of the Act of 1905, (Pri.) chap. 11, as undertakes to distinguish between the races in regard to the money apportioned from the public school fund is invalid. This, however, does not affect the other portions of the act.

8. The defendants have no right to take the school building now provided for the colored children and use it for the whites.

9. In executing the law, the defendants shall not discriminate against either race, but shall afford to each equal facilities. It is not intended by this that the taxes are to be apportioned between the races *per capita*, but that the school term shall be of the same length during the school year, and that a sufficient number of competent teachers shall be employed at such prices as the board may deem proper. Dictum in *Hooker v. Greenville*, 130 N. C., 473, disapproved.

10. If the defendant board or its successor shall refuse to establish and maintain the school upon a constitutional basis and in accordance with the constitutional provisions, the courts have power, by the writ of *mandamus*, to compel them to do so.

11. The two essential principles underlying the establishment and maintenance of the public school system of this State are: First, the two races must be taught in separate schools, and second, there must be no discrimination for or against either race. Keeping them in view, the matter of administration is left to the Legislature and the various officers, boards, etc., appointed for that purpose.

ACTION by W. A. Lowery and others against Board of Graded School Trustees of the Town of Kernersville and others, heard by *Judge Henry R. Bryan*, at the September Term, 1905, of the Superior Court of FORSYTH.

At the session of 1905 of the General Assembly, an act was passed and ratified entitled "An act to establish a graded school in the town of Kernersville, Forsyth County, North Carolina." The portions of said act material to be noticed in the discussion of the exceptions by plaintiffs to the judgment appealed from are: Section 1. The town of Kernersville is made a public school district to be called the Kernersville Graded School District. Section 2. Provides for the election of a board of trustees consisting of five members. Section 3. Directs the organization of the board and the election of proper officers. Section 4. That the trustees shall have exclusive control of the public school interests,

funds and property in the graded school district; shall provide rules for their government not inconsistent with law, fix the compensation of teachers, etc., shall make an accurate census of the school population of said district, as required by law, etc.; that all children residents in said district, between the ages of 6 and 21, shall be admitted to the school free of tuition charges. Section 5 directs the levying a special tax, etc., provided that the question be first submitted to the qualified voters of said district, at the municipal election in May, 1905. It is also provided that at the same time the proposition be submitted to the voters to issue coupon bonds not to exceed the sum of $4,000, to be used in the erection of a suitable school building in said school district. Section 7. That the moneys which shall, from time to time, be apportioned under the general school law of the State to the said school district be turned over by the treasurer of Forsyth County to the treasurer of the said school trustees for the benefit of said school; provided, that, in apportioning the school fund of said county, said graded school shall be allowed the proportion of said fund *per capita* to the white children of school age. Section 8. That the property, both real and personal, of the public school for white children shall become the property of said graded school and shall be vested in the said board of trustees, and their successors in trust, for the said graded school and the said trustees may, in their discretion, sell the same or any part thereof and apply the proceeds to the use of the public graded schools, to be established in said school district of Kernersville. Section 9 provides for issuing the bonds, etc., if approved by voters. Plaintiffs allege that, pursuant to the provisions of said act, an election was held in the prescribed territory, on first Tuesday in May, 1905, and that a majority of sixteen of the voters of said district cast their votes in favor of levying the tax and issuing the bonds provided for by the act. That only nine days' notice of said election was given, whereby

some electors who would have been against schools, were prevented from voting; that the defendants who were elected trustees at said election have organized, as provided in said act, and that the bonds have been prepared and delivered to them and that they now threaten to sell them, etc.; that the board of commissioners of the town of Kernersville threaten to levy a tax upon the property and polls in said district for the support and maintenance of said schools, etc.; that the board of education threatens to turn over to defendants the property of the public school for white children and do all other acts and things directed by said act in that respect; that the town of Kernersville has a population of about 1,200, counting both white and colored persons; that the colored persons in said town own property valued for taxation at $6,534; that the said act is unconsttitutional and void, in that it provides for no graded school for colored children within said district; that it discriminates to the prejudice of the children of the colored race and gives to the children of the white race advantage denied to the children of the colored race; that the election was irregular and unlawful, for that only ninety days' notice was given and that it was held on Tuesday instead of Monday. They demand that the defendants be enjoined from proceeding with the issuing of the bonds, etc., or levying the taxes, or doing any other of the several acts under and by virtue of the said act, etc. A restraining order was issued, with an order to the defendants to show cause why a permanent injunction should not issue, etc. Defendants answered, admitting the provisions of the act, the manner and time of holding the election, and that they were proceeding to discharge the duties imposed upon them by the several sections of the statute. They deny several immaterial allegations in this respect; they say they are advised that by the provisions of the act they are entitled to take charge of the colored school property in the district, and intend to do so and use it for the purpose of a

graded school for white children in the district, until they can build a school house suitable for school purposes, as provided by the act; that they intend to use the money collected from the white and colored people of the town for the support and maintenance of the white graded school and the colored school, so as to afford equal facilities for the school children of both races, as provided for the public schools in the several counties of the State. They further say that the county board of education have already turned over the property of the public school for white children of the district to the board of school trustees, and have already directed the money, apportioned to the white children of the district, to be turned over to said trustees for the benefit of the white schools under the provisions of the act; that the board of education have also ordered the treasurer of the county to pay to the school committee of the colored public school district, which embraces the town of Kernersville and considerable contiguous territory, the money to be applied to the maintenance of the school in the district, as heretofore, under the school law, which is amply sufficient to maintain the school for a period of not less than four and a half months, on conditions heretofore existing; that the public school district for colored people has in no way been changed or interfered with by these defendants, but they believe the money should have been turned over to the graded school trustees for said purposes, as well as the colored school property. The colored school children within school age in the district number 68, and the white school children within said age number 307—these numbers are ascertained by a census taken by defendant board of trustees; that heretofore there have been in the corporate limits of the town two public school houses used by each race separately. The public school money raised in the county has already been assigned and apportioned to the colored school district without regard to the act establishing the new graded school district. They

further deny that the act discriminates against either race; that it nowhere provides that the tax collected from the colored residents of the town shall be applied exclusively to the support of the white school, nor exclusively to the colored school; nor do the defendants intend, nor have they ever intended, to apply the money arising from the taxes on property or polls of the colored residents exclusively to either race, there being nothing in the act requiring them to do so or forbidding them to apportion to the public school for the colored children sufficient sums of money to afford them equal school facilities with the children of the white race; that the house now used for the colored schools is amply sufficient to accommodate the children of that race. They further say that they are advised that the election was held in accordance with law and was fairly conducted; that the voters of the town knew of the day and attended the election, casting their ballots as they wished, etc. The defendants filed affidavits tending to sustain their answer.

Judge Bryan, upon the hearing, found that the election was held substantially as required by the act; that the qualified voters in the town had ample opportunity to register; that the proceeds of the bonds proposed to be issued were to be applied to building a school house for the white children in the district; that the building for white children is insufficient to accommodate them, and the erection of a building for additional accommodations was necessary; that the school building for the colored children was amply sufficient and commodious for said children. Being of opinion that the act provided a graded school district embracing all of the territory within the limits of the town of Kernersville for both races without any unlawful discrimination for or against the children of either race resident therein, the court below held it was not unconstitutional, and vacated the restraining order and refused the injunction.

The plaintiffs appealed.

Lindsay Patterson and *T. F. Baldwin* for the plaintiffs.

Watson, Buxton & Watson and *Sapp & Hasten* for the defendants.

CONNOR, J., after stating the facts: If we concurred in the construction put upon the act by the learned counsel for the plaintiffs, we should feel compelled to declare it violative of the Constitution. We do not propose to bring into question the decisions made by this court in *Puitt v. Commissioners,* 94 N. C., 709, and *Riggsbee v. Durham, ibid,* 800. The principle, announced in those cases and uniformly adhered to by this court, is that a law which directs the tax raised from the polls and property of white persons to be devoted to sustaining schools for white children, and that raised from the polls and property of negroes to schools for negro children, is unconstitutional and void. In both of those cases, the language of the statute directing such distribution of the tax collected was clear and explicit. *Smith, C. J.,* says: "The fund is divided by race distinctions depending on the source from which the moneys are derived. This, as the judge decides, is forbidden by the Constitution, and, as the objects in view cannot be accomplished by using the funds as directed, or for any other purpose than the statutory requirements, it clearly ought not to be taken from the tax payers at all, because this is but a means of effecting an illegal law." Conceding that under the explicit language of section 2, Article IX, of the Constitution, there must be no discrimination in favor of, or to the prejudice of, either race, we proceed to ascertain whether there is imposed upon the defendant trustees any duty in respect to the establishment and maintenance of the Kernersville Graded School, provided for by the Act of 1905, inconsistent with this provision.

In discussing the language of the statute, it will be well to keep in view the universally recognized rule of construc-

tion which requires us to read the act in the light of, and with reference to, the Constitution of the State. The principle is well stated in Sutherland on Statutory Construction (2 Ed. Lewis), section 82: "Every presumption is in favor of the validity of an act of the Legislature and all doubts are resolved in support of the act. In determining the constitutionality of an act of the Legislature, courts always presume in the first place that the act is constitutional. They also presume that the Legislature acted with integrity and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution."

Peckham, J., in *People v. Terry*, 108 N. Y., 1, says: "In construing a statute which is susceptible of two constructions, one of which will render it valid and the other void, and both are equally reasonable, it is familiar learning that courts incline to, and will adopt the construction which renders the act valid rather than the one which avoids it." We will never assume that the Legislature intended to pass an unconstitutional act. "The courts may resort to an implication to sustain one act, but not to destroy it." *Atlantic Water Co., v. Const. Water Co.*, 44 N. J. Eq., 427. This rule is quite elementary and finds expression and application in the courts of every American State.

It must be conceded that the act is not so clear as could be desired, nor does it conform in many important respects to the many other acts found in our statutes establishing graded schools. Its defects are to be seen rather in omissions than positive provisions. We notice, first, the several criticisms made by the learned counsel for the plaintiffs. They say that it is manifest that it was never contemplated that there should be a school in the graded school district for the colored race; that only a school for the white race is provided for. We do not attach any importance to the term "graded school." While in other acts, which we have examined, the plural is used, we see no difficulty in finding in the act a posi-

tive direction to establish one school in which the children of each race are to be taught in separate buildings and by separate teachers. The Constitution expressly commands it to be done; this was well known to the draftsman and the Legislature. It will be noted that by section 4, the trustees are required to cause an accurate census of the school population in the district to be taken. It also expressly provides that all children resident in the district within the school age shall be admitted into the school free of tuition. It could not have been contemplated that, in defiance of the express language of the Constitution, all of the children of both races in the district should be admitted into one school building. The fair and only reasonable implication is, that under one board of management, one superintendent, the school should be so arranged and separated as to meet the constitutional requirement in that respect.

We do not suppose that the power of the defendant board to divide the district into as many sections, departments or schools as the convenience or necessity of the children of the district demanded, would be questioned. It is a matter of common observation and knowledge that, in the larger towns of the State, the trustees of the graded or city schools divide it into sections and locate each section or school to meet the convenience of the people, and this is done under the general power to establish a graded school for each race. If the white children are so numerous and the territorial limits of the district so large that, in the opinion of the board, two school buildings with a separate corps of teachers are necessary, certainly, if within their means, they may establish them under the power to establish a school for white children. The same principle applies to a school for colored children.

When a duty is imposed and power conferred upon a public agency, by necessary implication, the duty and power to do the thing in the manner directed by the Constitution, at-

tach. In this connection it may be proper to say that we do not concur in the suggestion contained in the answer that the graded school district of Kernersville can be confined to the limits prescribed by the act in regard to the white school and include contiguous territory for the colored schools. The school district prescribed by the act must include both races, and the taxes levied and collected upon the property and polls of both races in the district must be applied to the support and maintenance of a graded school for the children of both races—the schools to be separated and the children of each race to be taught in a separate school. In carrying out the provisions of the act, the imperative mandate of the Constitution, that there shall be no discrimination in favor of, or to the prejudice of, either race, must be observed. Thus construed, the constitutional requirement is complied with.

The act, section 4, expressly confers upon the board of trustees "exclusive control of the public school interests, funds and property in the graded school district as hereinafter provided." It is said that there are provisions in the act controlling this general grant of power which discriminate against the children of the colored race.

Before discussing the provisions objected to, we wish to note that another well settled rule in the construction of statutes is enforced by the courts. If the general scope and purpose of the statute are constitutional, and constitutional means are provided for executing such general purpose, the entire statute will not be declared void, because some one or more of the details prescribed, or minor provisions incorporated, are not in accordance with the Constitution, provided such invalid parts may be eliminated without destroying or materially affecting the general purpose. The rule is thus stated: "Where the unconstitutional portions are stricken out and that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be sustained." 26 Am. & Eng. Enc.

(2 Ed.), 570, in which a large number of illustrative cases are cited. This court has frequently recognized and enforced the rule. *Berry v. Haines,* 4 N. C., 311; *Darby v. Wilmington,* 76 N. C., 133; *Cotton Mills v. Waxhaw,* 130 N. C., 293. The difficulty is usually found in the application of the rule.

The general purpose and scope of the act under examination are declared to be to establish a graded school in the town of Kernersville. This purpose is not only in accordance with the Constitution, but in the furtherance of the right of the people to have the privilege of education and the duty of the State to guard and maintain that right. Dec. of Rights, section 27. The particular form and method of securing the right by the establishment of graded schools, when adopted by the people in accordance with law, has been uniformly maintained by this court. The district is clearly defined, the establishment of the school and levy of the tax are made dependent upon the will of all of the qualified voters within the district at an election to be held for that purpose. The tax is uniform upon all the property in the district, and the constitutional equation upon property and polls observed. All of the children within the school age are admitted, and, as we have endeavored to show, by reading the act in the light of the Constitution, this includes children of both races, to be taught separately. There is no discrimination in regard to the application of the tax in respect to races. A board of trustees is provided with ample power to execute the law.

The plaintiffs suggest that by section 7 it is provided that the money, which shall be apportioned under the general school law to the school district, shall be turned over to the treasurer of the trustees of the district for the benefit of said school, provided, that in apportioning the school fund of the county, the said graded school shall be allowed the proportion of the fund due *per capita* to the white children of school age.

We are not quite sure that we correctly interpret this section. We find in other acts, establishing graded schools, a similar provision in regard to the application of the fund from the general school tax apportioned to the children within the district, but such fund is usually directed to be received by the trustees and applied under their direction. If it is the purpose and effect of the seventh section to empower the use of all of the public school fund apportioned to the graded school district for the white schools, it is clearly in violation of the Constitution. This money, after apportionment, belongs to the children of both races and should be applied to the support of the schools for both races, without discrimination or prejudice.

Some light is thrown upon the subject by the answer of the defendants. It seems that prior to the passage of this act, the school district for the white children comprised the town of Kernersville containing 307 children of school age. The district for the colored children included contiguous territory, the number of colored children within the limits of the new district being only 68; that the public money from the general school fund has already been apportioned to the colored school district regardless of the Act of 1905, and that it is only the money apportioned to the white children which is to be paid over to the defendant board. We gather from the answer that the defendant board supposed that the Act of 1905 in no way changed the district established for the colored children. In this view His Honor did not concur, nor do we. It is permissible for the school authorities, under the general school law in each county, to so arrange the districts as to meet the needs of each race, that they may be of different territorial boundaries. The reasons for doing so in many cases are obvious. When, however, a new district is created by the Legislature with power to levy a special tax, and maintain a graded or large public school under the control of a separate and special board, we

are unable to see how the uniformity which the Constitution requires, as construed in *Puitt's case,* can be maintained, unless the district includes the children of both races. The difficulties in doing so are apparent.

We think, therefore, that so much of section 7, as undertakes to distinguish between the races in regard to the money apportioned from the public school fund, is invalid. This, however, does not affect the other portions of the act.

We can see no reason why the defendant board may not, under the general power "to control the public school interests, funds and property in the graded school district," receive the money apportioned to both races and apply it in the way provided by the Constitution. There is nothing in the section prohibiting them from doing so.

Section 8 is also obscure in its terms. It provides that the property of the public school for white children in the district shall become the property of the board of trustees, and that they may in their discretion sell the same and apply the proceeds to the use of the public graded school to be established. We infer from other provisions of the act that it was deemed necessary to give the board express power to sell this property, for the purpose of providing another building with the amount received, together with the proceeds of the bonds which they are by section 9 empowered to issue.

The answer of the defendants in respect to their purposes in regard to this property is obscure. They say they are advised and believe they are empowered to take charge of the colored school property in the district, and that they are intending to use the property for the purpose of a graded school for white children in the district, until they can build a more suitable house for school purposes. While the language of the answer would seem to be capable of the construction that they intend to take the property of the colored school and apply it to the use of the white school, this cannot be reconciled with other portions of the answer, in which

they declare their intention to maintain a school for both white and colored children, affording them equal school facilities. They further say, and His Honor so finds, that the present school building for the colored school is amply sufficient, whereas the building for whites is totally inadequate. Of course the defendants have no right to take the school building now provided for the colored children and use it for the whites. We assume they have no such purpose. Their entire answer repels any such construction. However all this may be, it does not render the portions of the act establishing the school invalid.

It is the duty of the defendant board of trustees to proceed to establish a graded school, in which all the children of school age within the new district may attend, to separate the schools into two sections or departments, in one of which the white children shall be taught, and in the other the colored children. The effect of the act is to take out of the original colored school district all of the property and children within the limits of the new district created by the act. In the provision made for executing the law, the board shall not discriminate against either race, but shall afford to each equal facilities. It is not intended by this that the taxes are to be apportioned between the races *per capita*, but that the school term shall be of the same length during the school year, and that a sufficient number of teachers, competent to teach the children in each section or building, shall be employed at such prices as the board may deem proper. If the board, or its successors, shall refuse to establish and maintain the school upon a constitutional basis and in accordance with the constitutional provisions, the courts have power, by the writ of *mandamus*, to compel them to do so.

We gather from the answer that the defendants propose to execute the important trust reposed in them in accordance with law. There can be no possible room for doubt or controversy in respect to the two principles underlying and

always controlling the establishment and maintenance of the public school system of this State. This system includes all public schools, or schools receiving for their support public taxes, either general or local. First, the two races must be taught in separate schools, and, second, there must be no discrimination for or against either race. Const., Art. IX, sec. 2.

In the Revisal of 1905, section 3990, the Legislature codified the Constitution and all statutes then in force involving these essential principles. They express the well considered and matured opinion of the people of the State upon this subject of such vital importance to the welfare of all the people. Keeping them in view, the matter of administration is left to the Legislature and the various officers, boards, etc., appointed for that purpose. This court would be reluctant to declare invalid an act establishing any public school when it had received the sanction of the people, directly and locally interested, unless it was manifest that these principles were violated. Much must be left to the good faith, integrity and judgment of local boards in working out the difficult problem of providing equal facilities for each race in the education of all the children of the State. Local conditions, relative numbers and other well recognized factors enter into the problem, and must be dealt with in a spirit of justice to all concerned, and to promote the honor and welfare of the State. In no sphere of our system of local self-government, under the guidance of a general superintendence and constitutional limitations, is the capacity of the people to govern themselves more strongly illustrated.

In this connection we wish to say that the language used in the opinion in *Hooker v. Greenville,* 130 N. C., 473, which seems to hold that in no other way than by a *per capita* distribution of all taxes collected for public schools, can the Constitution be observed, does not meet our approval. It was not necessary to the decision of that case, and we call

attention to it to exclude the conclusion that it is regarded as the opinion of this court. The learned and always candid counsel for the plaintiffs stated in his argument that he did not so construe the Constitution.

In regard to the bonds proposed to be issued, the proceeds to be used in the erection and furnishing of a suitable school building in the school district, we find nothing in the act to indicate that the use directed is prohibited by the Constitution. His Honor finds that there are 307 white children and 68 colored children in the district, and that the erection of the building for additional accommodation of the white children is necessary; that the public school building for the colored children is amply sufficient and commodious. We are unable to perceive how or why the erection of a necessary school building for 307 white children is a discrimination against 68 colored children for whom an amply sufficient and commodious building has been supplied. To require the same size building for 68 children as is furnished to 307, would be to keep the law neither in letter nor in spirit.

We have given anxious and careful consideration to the language of the act and the arguments of counsel, and we conclude that the general purpose and scope of the act are not in violation of the Constitution; that such sections as are subject to criticism do not so affect the statute as to render it invalid.

The defendant board of trustees will, we are sure, as they express their purpose to do, discharge their duties so that all the children of both races shall have equal facilities to attend the schools under the constitutional restrictions provided. If they should not do so, the courts would promptly aid any class of persons discriminated against.

We concur with His Honor that the election was valid. The judgment vacating the restraining order and refusing the injunction must be

Affirmed.

EDWARDS v. RAILROAD.

(Filed November 22, 1905).

Railroads — Crossings — Negligence — Contributory Negligence—Instructions.

1. An instruction that "it is the duty of the defendant's engineer or fireman to ring the bell or sound the whistle, or give other suitable and sufficient signals and warnings of the approach of its train, while moving its train in its yards, and to use all proper and reasonable efforts to avoid injuring any party who may be in its yards on legitimate business, and if the jury find that the defendant failed to give such signal and take such precautions, and said acts * * * resulted in the killing of the plaintiff's intestate, they should answer the first issue 'yes,'" is not contradictory.

2. An instruction that "the use of the highways and streets by the traveling public belongs as much to the public as the track does to the railway company, and for the company to block up the highways without absolute necessity, or to render its use so dangerous as to deter the public, or to keep them in constant fear of life and limb, would be a material and unlawful interference with their rights, and if the jury find * * * that the defendant so blocked up and obstructed a public highway, this would be evidence of negligence, and if such negligence caused the killing of the intestate, then the jury will answer the first issue 'yes,'" is correct.

3. A finding by the jury, that the plaintiff's intestate was guilty of contributory negligence, makes it unnecessary to consider an exception to a refusal of a prayer of defendant as to contributory negligence.

ACTION by R. S. Edwards, Administrator of Harry Praylow, against the Carolina & Northwestern Railway Company, heard by *Judge C. M. Cooke* and a jury, at the September Term, 1905, of the Superior Court of LINCOLN. From a judgment for the plaintiff, the defendant appealed.

D. W. Robinson for the plaintiff.

J. H. Marion and *C. E. Childs* for the defendant.

CLARK, C. J. At Lincolnton station the defendant's tracks are on the north side of the depot and those of the Seaboard Air Line Railway are parallel and on the south side. On the day in question a long freight train had come in on the defendant's track and had been engaged in unloading and shifting, some half hour, when the passenger train came in on the other road. Thereupon the defendant's freight train was "cut open" where the street leading to the town crossed its track. This street was then used, and had been for many years, as the main and only thoroughfare to and from the trains and depot. After being left open a short while, half the width of the street or less, and before the Seaboard passenger train had left, this interval in the defendant's freight train was closed to three or four feet in width. The plaintiff's intestate, who was the mail carrier between the station and the postoffice (which was on the north side), came from the Seaboard train pushing a wheelbarrow loaded with mail. He threw the mail across the opening, it being too narrow for his wheelbarrow, and then was trying to cross through himself, when the train came back and killed him. The defendant made the usual motion in negligence cases to take the case from the jury, but his first exception for the refusal of a nonsuit needs no discussion.

The second exception is because the court charged the jury that "it is the duty of the defendant's engineer or fireman to ring the bell or sound the whistle, or to give other suitable and sufficient signals and warnings of the approach of its train, while moving its train in its yards, and to use all proper and reasonable efforts to avoid injuring any party who may be in its yards on legitimate business, and if the jury find from the greater weight of evidence that the defendant failed to give such signal and take such precautions, and the said acts on the part of the defendant resulted in the killing of the plaintiff's intestate, they should answer the first issue 'yes.' *Smith v. Railroad,* 132 N. C., 824." The

defendant insists that this is contradictory because the first part of the instruction is in the alternative "ringing or sounding the whistle, and in the second part "giving the signal and take such precautions." But we do not so find it. The latter part says "signal and precaution," which is merely the equivalent of the alternative "signal" and "proper and reasonable effort" to avoid injury to others mentioned in the first part of that instruction.

The third exception is to the following instruction: "The use of the highways and streets by the traveling public belongs as much to the public as the track does to the railway company; and for the company to block up the highway without absolute necessity, or to render its use so dangerous as to deter the traveling public, or to keep them in constant fear of life and limb, would be a material and unlawful interference with their rights; and if the jury find from the greater weight of the evidence that the defendant in this case so blocked up and obstructed a public highway in the town of Lincolnton, this would be evidence of negligence, and if such negligence caused the killing of the plaintiff's intestate, then the jury will answer the first issue 'yes.' *Norton v. Railroad,* 122 N. C., 928;" but we think it a correct statement of the law, and this also disposes of the fourth exception.

The fifth exception to a refusal of a prayer as to contributory negligence need not be considered, for, if it were conceded to have been error to refuse it, the jury cured such error by its finding that the plaintiff's intestate was guilty of contributory negligence. It is true this prayer was that the defendant was not guilty of any negligence, if the intestate was guilty of conduct recited, which would amount to contributory negligence, and was properly refused on that ground.

There was conflicting evidence as to whether the flagman told the plaintiff's intestate to pass through or told him not to do so, and whether the train came back on a signal or not. The jury found on the first of these propositions that the intestate was guilty of contributory negligence in trying to

pass through the narrow opening, but further found that there was negligence in moving the train back and closing the gap, without warning to the intestate of such movement, and that this negligence was the proximate cause of his death. The judge told the jury that if they should "find that notwithstanding the negligence of the intestate in entering upon the crossing, the defendant by the exercise of ordinary and reasonable care, in the movement of its train, could have avoided striking the intestate, then they should answer the third issue 'yes.'"

The cause was fully and very ably argued here on both sides, but on full examination of the whole case, we think that the judgment below should be

Affirmed.

WILSON v. COTTON MILLS.

(Filed November 22, 1905).

Contracts—Construction—Questions for the Court—Delivery of Cotton—Tender—Issues—Damages—Loss in Weight.

1. The meaning of the terms of a contract whether written or verbal, when they are precise and explicit, is a question for the court, but if doubtful and uncertain, they may be submitted to the jury, with proper instructions, to ascertain the meaning and intent of the parties.

2. If the parties to an agreement dispute about its terms, an issue of fact is raised, as to the terms, to be decided by the jury who should be guided by instructions from the court.

3. Where the plaintiffs sold cotton to the defendant in March with the stipulation to deliver at their option in April, May or June, and on June 18 the defendant asked for an extension of the time fixed for delivery to July 8, which was not granted absolutely, and on June 25 the defendant ordered the plaintiffs to sell the cotton, when the price for July reached 11¼ cents or more, *held*, that this was a direction to hold the cotton for sale in July at not less than the price stated, and a refusal to take the cotton on July 23 was a breach of the contract.

4. Where the defendant had refused to take the cotton on July 23, this was a breach of its contract and it is immaterial that the plaintiffs shipped the cotton on the 29th, as they were not required to make any delivery, the refusal dispensing in law with any tender, and the plaintiffs being entitled to recover if they were ready, willing and able to deliver and otherwise comply with the contract on their part.

5. It is not material in what form issues are submitted to the jury, provided they are germane and each party has a fair opportunity to present his version of the facts and his view of the law so that the case can be tried on the merits.

6. In an action for the price of cotton sold, the loss in weight should not have been deducted in assessing the damages, as it appears from the defendant's letter that a loss "not to exceed three pounds per bale from the invoice weight" was to be allowed.

ACTION by R. T. Wilson and others against Levi Cotton Mills, heard by *Judge Chas. M. Cooke* and a jury, at the July Term, 1905, of the Superior Court of MECKLENBURG. From a judgment for the plaintiffs, the defendant appealed.

Action for the price of cotton. Plaintiffs alleged that in March, 1904, they sold to the defendant 100 bales of cotton at $14.42 per 100 pounds, to be shipped by them and delivered at Rutherfordton, N. C., in April, May or June, at their option, and to be paid for in lots of 25 bales each on the 10th, 20th, 25th, and 30th of July of that year. This the defendant admitted. Plaintiffs further alleged that afterwards, by agreement of the parties, the day of shipment was postponed until July 29, 1904, at which time it was shipped to the defendant, who refused to receive the same. Defendant denied the postponement, but admitted its refusal to receive the cotton, and alleged that it was shipped after the time of shipment had expired. The evidence tended to show that after some telegraphic correspondence, as to cancelling the sale upon request first made by defendant, the latter wrote the plaintiff as follows: "Yours of June 15 is at hand and noted. Would it be satisfactory to delay shipment

20 days? Please advise as to this. Do you expect a corner in July or August cotton? If you can sell 50 bales when July reaches 12.50 or over, you may do so. This order is subject to cancellation any time before your placing order. May get you to sell other 50 bales." Plaintiffs replied June 20 that they could probably delay shipment 20 days and would do so if they could, but they did not care for it to stand in the way of a favorable offer. They also stated that they would sell 50 bales when July contracts reached $12.50 or more. On June 25 defendant wired the plaintiffs as follows: "Sell, unless order revoked, first 50 bales July reaches eleven quarter or over." Plaintiffs replied: "We will execute this order if July reaches that point, which we fear is somewhat doubtful, unless we have some bad crop news." There was no other communication between the parties until July 23, when plaintiffs, through their agent, Mr. Lee, inquired of defendant if it had further directions to give in regard to the disposition of its cotton, to which the defendant replied that plaintiffs had not complied with their contract and it did not then need the cotton, which was afterwards shipped and tendered to defendant, who refused to receive it. The issues submitted to the jury with the answers thereto, were as follows: 1. Did the defendant refuse to perform its part of the contract? Ans. Yes. 2. What damage, if any, has the plaintiff sustained? Ans. $1,710 and interest from July 23, 1904. The jury were instructed that, as the contract was in writing, it is the duty of the court to construe it and that, if they believe the evidence, their answer to the first issue should be "yes." Upon the second issue the court charged that the measure of damages is the difference between the contract price, $14.42, and the market price of the cotton, at the place of delivery fixed by the contract, which witnesses testified was 11 cents, and that if they believed the evidence their answer to the second issue should be $1,710 and interest from July 23, 1904, the day on which the defendant refused

to receive the cotton. There was a judgment for the plaintiffs and defendant appealed.

Pharr & Bell for the plaintiffs.
Stewart & McRae for the defendant.

WALKER, J., after stating the case: There can be no doubt but that the construction of a contract is a matter of law. If committed to writing, the meaning of the terms, when they are precise and explicit, is a question for the court, but if doubtful and uncertain they may be submitted to the jury, with proper instructions given hypothetically as the case may require, to ascertain the meaning and intent of the parties. The law is the same as to verbal contracts. If the terms are explicit the court determines their effect simply by declaring their legal meaning. If the parties dispute about the terms of the agreement, an issue of fact is raised, as to the terms, to be decided by the jury who should be guided by instructions from the court. *Massey v. Belisle,* 24 N. C., 170; *Sizemore v. Morrow,* 28 N. C., 54; *Festerman v. Parker,* 32 N. C., 474; *Harris v. Mott,* 97 N. C., 103. *Gaston, J.,* says, in *Young v. Jeffreys,* 20 N. C., 213 (reprint 357): "Where a contract is wholly in writing, and the intention of the framers is, by law, to be collected from the document itself, then the entire construction of the contract—that is, the ascertainment of the intention of the parties as well as the effect of that intention, is a pure question of law, and the whole office of the jury is to pass on the existence of the alleged written agreement. Where the contract is by parol the terms of the agreement are, of course, a matter of fact, and if those terms be obscure or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construc-

tion of a written instrument." This language summarizes the whole doctrine and is quoted with approval in the more recent case of *Spragins v. White,* 108 N. C., 449, where the question is fully discussed. The principle applies, of course, to agreements evidenced by written correspondence. *Simpson v. Pegram,* 112 N. C., 541; *Lindsay v. Ins. Co.,* 115 N. C., 212. As the contract in this case was in writing, and as its terms, we think, are explicit and the meaning of the parties unmistakable, it becomes our duty to construe it and declare its legal effect.

Plaintiffs sold the cotton to defendant in March, 1904, subject to the stipulation expressed in the contract that they might at their option deliver in the following April, May or June. Defendant on the 18th day of June asked for an extension of the time fixed for delivery to July 8. The request was not granted absolutely; but if it had been, we do not think it would change the legal aspect of the case or cause us to come to a different conclusion, because before the time for delivery had fully expired, that is on June 25, defendant ordered plaintiffs to sell the cotton, when the price for July reached eleven and a quarter cents or more. This was a plain direction to hold the cotton for sale in July at not less than the price stated, as it could not be determined whether the price of cotton would reach that figure until the full month had expired, or until the last day of the month, as the market price is subject to fluctuation and sometimes, as we know, to sudden and decided changes, and the event on which plaintiffs were authorized to sell might have happened on that very day. The correspondence shows, therefore, by strong and irresistible implication, that plaintiffs were to hold the cotton during the month of July or until the price specified could be obtained. We have no doubt that this is the true meaning of the contract as evidenced by the several writings. The order of defendant could not well have been executed under any other construction.

Defendant does not deny that it has failed to comply with the contract, if this is its proper meaning. Counsel in their brief, frankly state that the sole question is, whether the cotton was delivered within the time fixed by the contract, their contention being that the time of delivery was never changed by the defendant's letter of June 18, and the telegram of June 25, and the answers of plaintiffs thereto. They argue that the order to sell was not tantamount to an order to delay the shipment of the cotton, and that it could not be so unless the order to sell was for an indefinite time and that plaintiffs did not so construe the order, as they did actually ship on July 29. The position is not tenable. The order to sell was extended by its very terms to the month of July, the sale to be made when the price reached eleven and one-quarter cents. No inference adverse to the plaintiffs can be drawn from the fact that they shipped the cotton on the 29th, as defendant on the 23rd had refused to take the cotton. This was a breach of its contract and plaintiffs were not required to make any delivery, the refusal dispensing in law with any tender, and plaintiffs then being entitled to recover if they were ready, willing and able to deliver and otherwise to comply with the contract on their part and, as to this, there was no dispute. *Grandy v. Small,* 48 N. C., 10; *Blalock v. Clark,* 133 N. C., 306; *Hughes v. Knott,* 138 N. C., 105. If plaintiffs did more than the law required of them, the defendant has no reason to complain on that account and cannot benefit by it.

The issues submitted were broad enough for the defendant to present its defense in every possible phase. We have recently said: "It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his view of the law, so that the case, as to all parties, can be tried on the merits." *Deaver v. Deaver,* 137 N. C., 240; *Warehouse Co. v. Oz-*

ment, 132 N. C., 839. The issues submitted were sufficiently comprehensive within the rule stated and the court properly rejected those tendered by the defendant. At least, there was no reversible error in doing so.

The loss in weight of the cotton should not have been deducted in assessing the damages, as it appears from the defendant's letter of March 23, 1904, that a loss "not to exceed three pounds per bale from the invoice weights" was to be allowed.

We have carefully considered the case and weighed the arguments, so well presented in the briefs of counsel, and have not been able to discover any error in the rulings of the court.

No Error.

CAVINESS v. FIDELITY CO.

(Filed November 22, 1905).

Principal and Surety—Subrogation—Executors and Administrators—Devastavit.

1. A surety company which has been called upon to pay a *devastavit* committed by its principal, an administrator, is entitled to be subrogated to the rights of the creditor against a party who received the money with knowledge of its wrongful appropriation and his rights are exactly those of the creditor.

2. Where an administrator is also a distributee, he is entitled to pay the other distributees and to retain himself, at any time during the administration, the amount to which each is entitled. If he pay more or retains more than is due, he is liable personally and on his bond for the excess.

3. While an administrator is allowed by statute two years within which to settle the estate, he should, when there are no debts or other exigiencies requiring the retention of the funds, pay them to the distributees and they may within the two years maintain an action for them.

4. Where an administrator committed a *devastavit* in February, a party who received the money with knowledge of its wrongful appropriation, can be compelled to answer to the extent of the *devastavit*, but he is not liable for any *devastavit* thereafter on the part of the administrator of which he had no knowledge.

ACTION by J. M. Caviness, Administrator *de bonis non* of Jas. A. Cole against Fidelity & Deposit Co., of Maryland, and others, heard by *Judge R. B. Peebles* and a jury, at the July Term, 1905, of the Superior Court of RANDOLPH. From the judgment rendered, the defendant company appealed.

L. W. Humphrey and *Elijah Moffitt* for the defendant company.

H. A. London & Son for the defendant Russell.

CONNOR, J. James E. Cole qualified on November 11, 1902, as administrator of J. A. Cole, deceased, and executed his bond in the penal sum of $18,000 with the defendant company as surety. On March 3, 1904, he was removed and the plaintiff appointed administrator *de bonis non* of the estate. This action is prosecuted by the plaintiff against J. E. Cole and the surety company to recover the amount remaining, or which ought to be, in his hands belonging to the estate. The defendant surety company in its answer alleges that $5,000 of the assets of the estate were paid by the administrator to W. S. Russell on account of certain stock purchased by the administrator and his brother, T. A. Cole; that Russell had knowledge that the said sum was a part of the assets and property of the estate. The defendant claimed that it was subrogated to the rights of the plaintiff to call upon Russell to refund so much of said amount as should be necessary to indemnify it from loss on account of the *devastavit* of the administrator. Russell was made a party defendant and filed an answer denying the material allegations of the defendant company's answer. From the admissions in the

pleadings, findings by His Honor, and the verdict of the jury upon issues submitted, we gather the following facts:

J. A. Cole died intestate leaving five distributees, two of whom were the administrator and his brother, T. A. Cole. Prior to February 5, 1903, the administrator received, on account of the estate, about $9,600. He held a note against one of the distributees for $1,136.92, and owed a note himself of $1,000. Subsequent to February 5, 1903, he received about $400. The total indebtedness of the estate did not exceed $200, the larger portion of which was paid prior to February 5, 1903, leaving in the hands of the administrator on that day about $9,400. On said February 5, 1903, he drew a check upon the assets of the estate in the Bank of Randolph, payable to himself and his brother, T. A. Cole, for $5,000, which was deposited in bank to their credit. On the same day he and his brother purchased from defendant Russell 130 shares of stock in the Enterprise Manufacturing Co. for $20,000, and, on account thereof, gave him a check on their bank account for $5,000—Russell retaining a lien on 166 shares of stock for the balance of the purchase price. Russell had knowledge of the source from which the $5,000 was obtained.

The court below found by an inspection of the accounts of the administrator that the balance due the plaintiff administrator d. b. n. from Cole, former administrator, was $3,699.58, and that the interest of said J. E. Cole and T. A. Cole in the estate was $3,851.55. It appeared that on October 15, 1903, the administrator paid to himself and his brother each $2,000 from the assets of the estate. On said day he paid Mrs. S. F. Caviness, one of the distributees, $2,000—the payment being made by surrender of her note and $862.08 cash. On November 10, 1903, he paid Mrs. Green, another distributee, $500. He paid the Marble and Granite Co. $400, and for taxes, charges of administration,

etc., about $200. He did not pay the note of $1,000, but it is charged to him in his account.

His Honor states that in ascertaining the interest of J. E. Cole in the estate, he has deducted said note, and that he was of the opinion that defendant Russell was liable to account for the amount received by him, but was entitled to deduct therefrom the interest of J. E. Cole and T. A. Cole, which he ascertains to be $3,851.55, from the $5,000, leaving a balance of $1,148.45, for which he gives judgment against Russell, directing him to pay it into court, to be applied to the judgment for $3,699.58 against J. E. Cole and the surety company.

From this judgment the defendant surety company appealed.

No testimony is set out in the record or case on appeal; hence we cannot pass upon the second contention, which His Honor said was made for the first time in the case on appeal. As between the plaintiff and the defendant J. E. Cole, there can be no doubt as to the correctness of the ruling and judgment. This is demonstrated by a simple calculation. The amount recovered will pay to the distributee, who has received nothing, the one to whom $500 has been paid, and the one to whom $2,000 has been paid, the amount due on their distributive shares, and leave in the hands of the plaintiff the exact amount due J. E. and T. A. Cole to equalize their share.

The principle by which His Honor was guided is announced in *Grant v. Bell*, 90 N. C., 558. The estate, so far as the plaintiff is interested, is settled by the judgment. The defendant surety company insists that it is subrogated to the rights of the plaintiff and is entitled to call on the defendant Russell to refund to it the amount received from Cole, just as the plaintiff could have done. We entertain no doubt that in equity the company is subrogated to the rights of the plaintiff against Russell. Has it any other or higher right

than the plaintiff had? Certainly, as between the other distributees and Cole, the latter was entitled to pay them and to retain himself, at any time during the administration, the amount to which each was entitled. No one except creditors could complain. If he paid more or retained more than was due, he was liable personally and on his bond for the excess. The defendant surety company says that the payment to T. A. Cole and appropriation by himself of the $5,000 was a *devastavit*. This is true so far as the amount was in excess of their interests.

It is elementary that one asserting the right of subrogation stands in the shoes of the creditor, to whose right he is subrogated. His rights are exactly those of the creditor whose debt he has paid. There is no privity of contract between Russell and the surety company. It is insisted that an administrator commits a *devastavit* by paying out the assets to a distributee before the expiration of one year from the date of administration. If there be debts unpaid, this is undoubtedly true; or if he pays one distributee more than his share, to that extent it is a *devastavit*.

This court has held that while the administrator is allowed by statute two years within which to settle the estate, he should, when there are no debts or other exigencies requiring the retention of the funds, pay them to the distributees, and that they may within the two years maintain an action for them. In *Clements v. Rogers*, 91 N. C., 63, this court refused to dismiss an action, brought within the two years, when it was admitted that there were no debts outstanding. In *Allen v. Royster*, 107 N. C., 278, it was held that the plaintiff distributee was not required to allege the non-existence of debts—*Merrimon, C. J.*, saying, in response to a motion to dismiss because the complaint did not negative the existence of debts: "It need not necessarily allege that two years have elapsed next after the administrator qualified as such, and before the action begun, because the administrator might

consent to account fully or partially with the next of kin before such lapse of time, and if there should exist a valid reason why he should not, he should set it up as matter of defence in a proper way. It might turn out that the court would require the administrator to account with the distributees in some measure, and stay the final account until the end of two years." If the distributees had sued the administrator at the time he paid the amount to his brother and himself, the court, upon the facts as they existed on that day, would have sustained the action and required him to pay over the amount in his hands to all of the distributees.

In the condition of the estate on February 5, 1903, no *devastavit* was committed in paying over to himself and his brother the amount due them; to that extent the payment was rightful. Russell is fixed with notice of the conditions as they existed on that day. If he had been called to account on February 6, 1903, Russell would have been compelled to pay the other distributees the difference between the amount received by him and the amount which was due J. E. and T. A. Cole. The fact that more than six months thereafter (October 15, 1903), he paid to himself and his brother $4,000, which was a *devastavit* of which Russell had no knowledge, cannot change or increase his liability, for that was fixed at the time he received the money, February 5, 1903.

We concur with the court below that Russell was not liable for any shortage on the part of Cole, administrator, which occurred after February 5, 1903. Suppose that he had paid Russell the exact amount due his brother and himself on February 5, and six months thereafter committed a *devastavit* by appropriating other money belonging to the estate, is it possible that thereby Russell would have been made liable? Certainly there was no wrong done in paying T. A. Cole to the extent of his interest, and we are unable to perceive any reason why he was not entitled to retain the

amount due himself on that day. The receipt of Russell in excess of the amount due, with knowledge of the facts, was wrongful, and to the extent of the wrong done he must answer to the surety company, just as he would, if called upon by the distributees, have been required to do.

There is no suggestion that there was any actual fraud intended by Cole or Russell at the time of the payment. While the payment of the excess was unlawful, it is not inconsistent with an honest mistake in respect to the amount of their interests in the estate. It is sufficient that we find in the principles of the law a remedy commensurate with the wrong.

If the defendant Russell still holds the stock, we can see no reason why the defendant surety company may not subject Cole's interest by an equitable execution or by supplemental proceedings. As all parties are before the court, it would seem this could be done in this action. Other parties may be brought in and pleadings amended for that purpose if the defendant company be so advised.

With the right to take further action as indicated, the judgment is

Affirmed.

PACE v. RALEIGH.

(Filed November 28, 1905).

Registered Voter—Qualifications—Payment of Poll Tax—Registration—Elections.

1. Under section 7, chapter 233, Laws 1903, which provides that "It shall be the duty of the governing body of any city or town, upon the petition of one-third of the registered voters therein, who were registered for the preceding municipal election, to order an election," only those persons are entitled to sign the petition, who, besides being lawfully registered, upon possessing the necessary qualifications, have further paid the poll tax (if liable for poll tax under Act V, section 1, of the Constitution).

2. The General Assembly can prescribe such terms as it thinks proper as a prerequisite to ordering an election.

BROWN AND WALKER, JJ., dissenting.

ACTION by State *ex. rel.* J. M. Pace and others against the City of Raleigh, pending in the Superior Court of WAKE, and heard by *Judge M. H. Justice,* at Chambers at Raleigh, on the 27th of September, 1905, upon the pleadings and admissions of the parties.

This was an application for a *mandamus.* The plaintiffs and others presented a petition to the board of aldermen of the City of Raleigh asking that an election be called to determine whether saloons should be licensed in said city for the sale of intoxicating liquor in lieu of the existing City Dispensary. The committee to whom the petition was referred reported that they found on the registration books 1,826 names, but that 233 of those registered had moved and 35 had died, leaving 1,568 valid registered names. That after purging in the same manner from the petition the names of those who had removed or died there remained on the petition 543 names. Upon further reference to ascertain how many of those upon the registration books and

the petition respectively were entitled to vote by having paid the poll tax for 1904 on or before May 1, 1905, as required by the Constitution, it was found that 266 persons on the registration list had not so entitled themselves to vote, of whom the names of 113 were on the petition. The board, thereupon, authorized any one entitled to vote at the proposed election to come forward and add their names to the petition or to withdraw them; whereupon there were 10 names added to the petition and 22 were withdrawn. The board found, in accordance with the above figures, that there were 1,302 registered voters, of whom 418 had signed the petition, being "sixteen names less than one-third of the registered voters who were registered at the last municipal election," and refused to order an election. This proceeding was brought for a *mandamus* against the board of aldermen to order the election, which being granted, the defendants appealed.

Argo & Shaffer and *W. B. Jones* for the plaintiffs.

R. H. Battle, W. B. Snow and *W. N. Jones* for the defendants.

CLARK, C. J. Chapter 233, Laws 1903, provides: "Sec. 7. It shall be the duty of the governing body of any city or town, upon the petition of one-third (1-3) of the registered voters therein, who were registered for the preceding municipal election, to order an election to be held," etc. "Sec. 8. Any person entitled to vote for members of the General Assembly shall have the right to vote at such election, in all boxes provided, and any such voter who is in favor of the manufacture," etc., * * * "and every such voter who is in favor of bar rooms or saloons shall vote a ticket on which shall be written or printed," etc.

The sole question presented is, who are the persons entitled to sign a petition for an election under this statute

which requires "one-third (1-3) of the *registered voters* therein, who were registered for the preceding municipal election." The plaintiffs contend that a "registered voter" is any one who is duly and lawfully registered. The defendants contend that a "registered voter" must not only be registered, but he must also be a voter, *i. e.,* "entitled to vote," which right the Constitution denies to one who is merely registered—that it is further necessary that he shall have paid his poll tax. In short, the plaintiffs contend that any one who is registered is a voter, though he may not be an actual "voter" entitled to vote; while the defendants contend that he must not only be registered, but also a voter.

The plaintiffs are not entitled to their *mandamus* unless they can maintain their proposition that registration makes any one who is duly and lawfully registered, a "voter." Who is a voter? Webster's International Dictionary defines "Voter: One who votes, who is entitled to vote." This is the definition in section 8 of this act (chap. 233, Laws 1903,) which says, "Any person *entitled to vote* for, etc., shall have the *right to vote* at such election."

The language of the Constitution is not ambiguous. The Constitutional Amendment, now Article VI, section 4, provides: "Every person presenting himself for registration should be able to read and write any section of the Constitution in the English language; and *before he shall be entitled to vote,* he shall have paid on or before the first day of May of the year in which he proposes to vote, his poll tax for the previous year, as prescribed by Article V, section 1, of this Constitution." Then after the authorization of a permanent roll for those registering under the "Grandfather Clause," it is again added: "Provided, such person shall have paid his poll tax as above required." Before one is lawfully a voter he must be "entitled to vote," and from the above it is plain that being registered does not entitle one to vote, for it is added, both as to those whose names are upon the ordinary,

and the permanent roll, "and before they are entitled to vote," they shall have paid their poll tax (if liable for poll tax under Article V, section 1, of the Constitution).

Under the constitutional provisions prior to the amendment, every male person, born in the United States, or naturalized, 21 years old, resident in the State 12 months and in the county 90 days (who was not disqualified by conviction of felony) was an "elector" (or "qualified voter," as the decisions styled him for lack of a better word), and when registered was entitled to vote. As the Constitution then stood, nothing more was required and such person was a "registered voter." But the Constitutional Amendment made a radical change. It is now before us for the first time and decisions as to "qualified voters" and "registered voters," under the former constitutional requirements as to suffrage, throw no light upon the meaning of the new clauses which have taken their places in the Constitution.

Under the Constitutional Amendment of 1899, now Constitution, Article VI, section 1, every male person, born in the United States, or naturalized and possessing qualifications set out in this article, shall be entitled to vote, "except as herein otherwise provided." Section 2 requires two years' residence in the State, six months in the county and four months in the precinct (with disqualification by conviction of a penitentiary offense). Section 3 prescribes that a person offering to vote shall be a legally registered voter "as herein prescribed." Section 4 then provides that in addition to the above qualifications as to age and residence, "Every person presenting himself *for registration* shall be able to read and write any section of the Constitution in the English language" (unless registered under the "Grandfather Clause" later set out); "and before he shall be entitled to vote he shall have paid on or before 1 May of that year, 'his poll tax for the previous year'" (if liable thereto under Article V, section 1), and even as to those registered under the grand-

father clause and upon the "permanent record," who "shall forever thereafter have the right in all elections by the people in this State" (unless disqualified for crime), there is added, "Provided, such person shall have paid his poll tax as above required." This shows that under the former provisions one qualified by age and residence (and not disqualified by crime) was an "elector" and became, upon registration, a "registered voter;" but under the Constitutional Amendment one qualified by age and residence (and not disqualified by crime) is entitled to register, provided, further, he can read and write, as required, or can register under the "Grandfather Clause," but it is carefully added that in neither of those cases shall he become "entitled to vote" unless further he shall have paid his poll tax (if liable thereto) at the time prescribed.

The Constitutional Amendment was carefully thought out and fully debated both in the convention and before the people. There was doubtless good reasons, of public policy, for prescribing that no one, though otherwise qualified and duly and lawfully registered, should be entitled to vote unless he shall have paid his poll tax. Before that is done, he may be registered, but he cannot be a "registered *voter,*" because he cannot vote.

The General Assembly could prescribe such terms as it thought proper as a prerequisite to ordering an election. It could have dispensed with any petition, or it need not have required one-third, or indeed that the petitioners should be "registered voters," but having done so we are only authorized to hold those to be voters who the Constitution says are "entitled to vote," *i. e.,* those who, besides being lawfully registered, upon possessing the necessary qualification, have further paid the poll tax (if liable). The object in requiring one-third of the "registered voters" to join in the petition was doubtless to avoid the expense, turmoil and heated controversy incident to an election of this kind, unless at least

one-third of those entitled to vote in such an election should indicate their desire that such election should be held.

The order of the board of aldermen was proper upon the facts before them. In the view we take of the case, we have not found it necessary to express any opinion upon the right of the board to purge the registration list, though there are authorities which seem to justify that course. *Duke v. Brown*, 96 N. C., 127; *Rigsbee v. Durham*, 99 N. C., 348. Nor have we been inadvertent to the fact that under the former constitutional provision one who was an "elector," *i. e.*, qualified to register was eligible to office, though not registered, and that under the "Amendment" no one is eligible to office unless he is a "voter," *i. e.*, registered upon proper qualification and having paid his poll tax (if liable). There is no hardship in this. The same public policy which requires the payment of poll tax and registration in addition to the qualification as to age and residence, to constitute a "voter" can surely require the same as to one who asks the suffrage of voters. If it be conceded that the board of aldermen had no right to purge the registration lists, then clearly the *mandamus* could not issue, for the petition with its 543 names did not contain one-third of the names (1,826) upon the registration lists. If the aldermen can purge the registration lists by striking off those voters who have become disqualified by removal, or otherwise, they can surely purge it, by striking off those who have never been entitled to vote because of the constitutional disqualification of not having paid their poll tax. It does not appear in the record that the tax list was the sole evidence resorted to, nor that such evidence was not corroborated by notice to the parties (as is probable) or otherwise, nor that any person affected alleged that his poll tax had been paid in fact, as would have been done if there had been any doubt as to any name which had been disallowed. Certainly there is no exception in the record to the method pursued, nor to the truth of the finding of non-

payment of poll tax as to any person, nor was any objection on that ground presented even in the argument here; but the plaintiffs earnestly and correctly contended that an appeal must be considered solely upon the exceptions set out in the record—save only exceptions that the court did not have jurisdiction or a cause of action is not stated, which objections alone can be taken for the first time in this court (Rule 27 and cases cited in Clark's Code, pp. 921-924,) and these objections cannot be open to a plaintiff. If the plaintiffs had any doubts as to the correctness of the findings of fact as to the non-payment of poll tax by any one, they should have contested it before the aldermen, and could again have tried that point *de novo* before the judge; for while the findings of fact by a Superior Court judge are binding upon us, the findings of fact by the aldermen were open to review before the Superior Court. *In re Deaton,* 105 N. C., 59. But so far from the plaintiffs contesting the truth of the findings of fact as to the non-payment of poll tax, the judgment recites that in the Superior Court it was "admitted by the parties, plaintiffs and defendants, that the only question to be considered in the case * * * is one of law, to-wit: Whether under section 7, chapter 233, Laws 1903, the payment of poll tax on or before 1 May of the year in which he offers to vote, should be applied as a test of competency to sign the petition." This was the sole question that was, or could be presented to us on the appeal.

No one is disfranchised by this opinion, but it is simply held that upon the findings of fact, to which the plaintiffs made no exception, one-third of those entitled to vote at the proposed election have not signed the petition. This would not of course be an estoppel nor preclude a further ascertainment of the fact in any election at which any party affected might offer to vote.

The judgment below is

Reversed.

BROWN, J., dissenting: I regret to differ with my brethren in any case and especially in this in which my natural inclinations strongly prompt me to concur. But my convictions are strong that the board of aldermen illegally struck from the petition the names of a large number of those who had the legal right to sign it. I am of opinion: 1. That the board had no power to strike them off for the alleged non-payment of poll tax. 2. That the board has no authority to pass upon such fact. 3. That if they had such authority they exercised it in an illegal manner and based their finding upon utterly incompetent evidence.

1. The right to petition for an election in certain cases is a right of the private citizen given by law. It is as much a legal right to those to whom it is given as the right to vote is to those who possess the necessary qualifications. In my judgment the qualifications necessary to legally petition for an election include only those which are necessary to enable a person to register and thereby become what our Constitution plainly calls a "registered voter." These do not include payment of poll tax. The language of the statute is as follows: "Sec. 7. That it shall be the duty of the governing body of any city or town, upon the petition of one-third (1-3) of the registered voters therein, who were registered for the preceding municipal election, to order an election to be held," etc. Chap. 233, Acts 1903. The Constitution, Article IV, section 3, enacts that "Every person offering to vote shall be at the time a legally registered voter as *herein prescribed.*" Section 2 prescribes the only qualifications but one necessary to become a registered voter referred to in section 3. These are residence in the State for two years, in the county six months, and in the election district four months, preceding the election. Section 4 adds the other, an educational qualification. There is of course the well known disqualification for crime. Thus the man who registers becomes, in the language of the Constitution, a

"registered voter." He may exercise the right or not as inclination or duty may prompt him. But before he can exercise it he is required by section 4 to pay his poll tax for the previous year and such payment must be made on or before May 1 of the year in which he proposes to vote. When the Legislature used the words "registered voter" it used them in the sense in which they are employed in the Constitution and as previously defined by the courts. This is an elementary principle of the construction of statutes. This court as long ago as 1875 has made a broad distinction between a registered voter and a qualified voter, and that distinction has been generally recognized both by the General Assembly and the judiciary. *Mr. Justice Rodman,* speaking for a unanimous court, says: "A qualified voter is one who is entitled to register as a voter, and who is also qualified to vote after such registration." *Railroad v. Caldwell,* 72 N. C., 493. Again he says in the same opinion: "But in the idea of the Constitution the terms qualified voters and registered voters are not exactly co-extensive." See also *Norment v. Charlotte,* 85 N. C., 389. Having shown that the right to become a "registered voter" is a distinctive right given by the Constitution, and so recognized by the courts, the Legislature is presumed to have used the term in the significance so given it. The right to become a registered voter ante-dates the time fixed for the payment of poll tax, and, therefore, it follows that a registered voter, within the plain meaning of the Constitution, is one who has registered, but has not paid his poll tax. When he does the latter, he becomes a fully qualified voter. If the General Assembly had intended that only qualified voters should sign the petition it would have used those words and not the term *"registered voters."* It had the same power to require one as the other as a condition precedent to holding the election. With perfect deference for my brethren, it seems plain to me that they have by judicial construction read into the statute words which the

General Assembly never intended to place there. Inasmuch as the disability arising from not having paid poll tax postdates registration in all cases, it is evidently regarded in the Constitution and statute as a temporary disability to vote and not as a barrier to becoming a registered voter. The failure to pay this tax does not authorize the erasure of the delinquent's name from the registry of voters. It only disables him to vote at the succeeding election. When he registers he is made a registered voter by force of the Constitution. He may fail to pay poll tax for ten years and then exercise his right to vote by the payment of poll tax for one year only. But ordinarily and with unchanged conditions he is not required to register but once. The failure to pay the tax does not affect in any way his status as a registered voter. So that when the law says one-third of the registered voters for the preceding municipal election, it does not mean registered voters who might not be free to vote at a present *election* from failure to have paid poll tax by the first of the preceding May, but it means all whose names are upon the registration books as standing, permanent voters, that is, all who are potential voters.

I have not reviewed the authorities cited in defendant's brief because they are not noticed in the opinion of the court and have, in my judgment, no application to the point under discussion, for the reason that we are now considering the law which prescribes qualifications for *petitioners* for an election, and not qualifications of *voters* at an election.

2. We were invited by counsel on both sides to scrutinize this record with care. I have done so, and in the investigation of the case another reason, not mentioned in argument or brief, has occurred to me which greatly strengthens my conviction that the General Assembly used the words "registered voters" advisedly and in the sense they have always been used. That is, because the statute fails to give to the city authorities any power to determine who has not paid poll

tax and fails to declare how the fact shall be proven and what evidence is necessary. It provides no machinery for this purpose. Whether a man is a registered voter can be easily determined by a simple inspection of the registration books. Whether or not he has paid his poll tax cannot be determined by an inspection of the tax books. If that were allowed, the sheriff or tax collector could temporarily disfranchise any one by failing to enter the payment. The Legislature of 1901 was not willing to place the registered voter in the power of the tax collector, and so under the general election law enacted at that term the tax lists constitute no evidence whatever. They are utterly incompetent to prove anything. The entries of payment are *ex parte*. The voter has no control over them and they are not evidence against him upon the fact of payment. There is no law that I can find that requires the sheriff to make the entry of payment of taxes upon the lists. Such entry is his own act, for his own convenience, and is not a public record. *Noble v. Douglas,* 56 Kansas, 92.

The Act of 1901 provides that it shall be the duty of every sheriff and tax collector, between the 1st and 10th days of May, 1902, and biennially thereafter, to certify under oath a true and correct list of all persons who have paid their poll tax for the previous year on or before the first day of May, to the clerk of the Superior Court, who shall, within ten days, record the same in a book to be provided for that purpose, keeping each township separate, and certify a true copy thereof to the chairman of the board of elections for such county. This evidently for information for purposes of challenge. If it were permissible to refer to the tax books to determine who has paid poll tax, this certified list would be the best evidence of that fact, and not the sheriff's entries on the books. This list is the evidence provided for the board of elections, but it is not made evidence against the voter. The record in this case shows that the committee of the board of aldermen, appointed for the purpose of determining who had paid poll

tax, referred only to the sheriff's tax books and accepted the entries there as conclusive evidence.

If the construction of the statute adopted by the majority of the court is the true one, and it was the intention of the Legislature that the words "registered voter," plain and unequivocal as they are, should mean "qualified voter," is it not strange that the governing bodies of cities and towns are given the naked power, necessarily implied under the court's construction, to determine who are qualified voters, and left without a vestige of machinery for such determination? Is it that the true qualifications of a voter are to be left for determination to the uncertain judgment of a board of aldermen to be allowed or denied in the absence of the voter and without the right to be heard? The statute does not suggest any means of determining who are and who are not qualified voters. It is silent as to the tax books. Where, then, is the authority to consult the sheriff's office for guidance; where is the right to accept the sheriff's entries or lack of entries as conclusive of the payment or non-payment of poll tax? It cannot be found in the statute. And yet, the logical result of the opinion of the court is to construe into the act this authority. Is such a construction reasonable? I answer this by again referring to the general election law, enacted by the Legislature of 1901 and considered and approved by the Legislature of 1903, to show an unwillingness on the part of the Legislature to leave the right of suffrage to any such control and to show the unusual care in providing machinery for the determination of the qualifications of a voter. Following the requirement that no person shall be entitled to vote unless he shall have paid his poll tax in accordance with the Constitution, the act provides: "Every person liable for such poll tax shall, before being allowed to vote, exhibit to the registrar his poll tax receipt for the previous year, issued under the hand of the sheriff or tax collector of the county or township where he then resided: Provided, that in lieu of such poll tax

receipt it shall be competent for the registrar and judges of election to allow such person to vote upon his taking and subscribing the following oath: 'North Carolina, ... County. I do solemnly swear (or affirm) that on or before the first day of May, of this year, I paid my poll tax for the previous year, as required by Article VI, section 4, of the Constitution of North Carolina.' "

In enacting this provision the Legislature recognized that the exercise of the right of suffrage should be favored and not discouraged, and that the method of determining the existence of the right should be simple. It is true that the determination of the board of aldermen as to the payment of poll tax by the signers of the petition does not involve the right to vote, but only the right to call an election. But it matters not that the right to vote is not directly involved. The right to petition is a legal right conferred by the act and this court says depends upon the right to cast a vote. Under the court's construction of the statute a resident of the city of Raleigh, or of any other city, although a registered and qualified voter, may be denied a voice in calling an election, because the board of aldermen in an *ex parte* proceeding, when he is not present, with no evidence before it save the tax list of the sheriff, may find that he is not a qualified voter.

A supposed state of facts will show the injustice of the court's construction. A has signed the petition for an election; the sheriff's tax list does not show that he has paid his poll tax; the board of aldermen on such negative and incompetent evidence erase his name from the petition; on the day of election he presents his tax receipt, or makes oath that he has paid his poll tax, and votes at the election which he was denied the right to call. In this case the voter is refused the right of petitioning for a municipal election in which he has the right to vote.

As a further evidence of the importance of this machinery for determining the qualifications of a voter, it is provided by

the general election law that the failure of the sheriff to give a tax receipt is a misdemeanor, and he is required upon application and affidavit of the applicant that his receipt has been lost to provide a duplicate receipt. The act, however, provides no penalty for a mistake in the list of persons who have paid their poll tax, and does not even require the entry to be made on the tax books, other than the list to be furnished the clerk of the court, which was not referred to by the board of aldermen in this case. That the tax books are subject to mistakes cannot be doubted. Is the voter then to be given no opportunity to correct such mistake, or make oath to the payment of his poll tax and be entitled thereby to sign the petition? It seems to me to be a strained construction of the legislative intention to hold that in the face of the specific machinery of the general election law for determining the qualification of a voter, they should empower the governing bodies of towns and cities to adopt any method they should see fit to adopt to determine so important a matter. Is the voter, whose right to sign the petition is attacked, given the right by the terms of the statute, either express or implied, to be present when the matter is considered? Is he entitled to any hearing? Is he entitled to notice? Can he present his tax receipt or make oath that he has paid his poll tax? Can he show that he is exempt from poll tax? The statute gives no such rights. Then I must assume that these rights are denied him, and this assumption is supported by the facts in this case. The report of the committee of the board of aldermen of the city of Raleigh, in explaining the method pursued in determining the qualification of the signers of the petition, says: "We examined the tax book of the sheriff of Wake County for the year 1904, and found that two hundred and sixty-six (266) persons whose names are on the registration books failed to pay their poll taxes for the year 1904 on or before May 1, 1905; of these 266 names we find 113 on the petition of persons whose names are on the regis-

tration books who failed to pay their poll taxes for the year 1904 on or before May 1, 1905."

Is their conclusion justified? They say they examined the tax books only. They made such examination in the absence of the voter, and yet on this sort of incompetent evidence they conclude that the poll tax has not been paid and deny *registered voters* the right to petition for an election. Has the right of suffrage so far lost its sanctity that its exercise can be made dependent upon conclusions drawn from such evidence? Books, possibly incorrect, a committee, possibly mistaken, and from this the conclusion is drawn that 113 petitioners, all of whom are absent, have failed to pay their poll tax. And this unwarranted method is endorsed by this court because Mr. Webster defines a voter to be, "One who votes, who is entitled to vote." It appears to me that this is a forced construction and that it could not have been the intention of the Legislature to empower a board of aldermen to determine in an *ex parte* proceeding the qualifications of one offering himself as a voter, when the general election law was so solicitous in protecting the registered voter's right to prove his qualification.

That the construction of a statute should be reasonable is familiar learning. That it should be construed in the light of existing legislation on the same subject is also well settled. What is a reasonable construction of the statute before us? The Legislature intended to provide a simple, convenient and cheap method of petitioning and calling an election. A petition of a specified number of *citizens* was open to the objection that women and children, who are citizens in the broadest sense of the word, might sign it; a specific number of *qualified voters* was inconvenient because, as I have pointed out, it would involve a cumbersome and tedious method of determining who are qualified voters. The Legislature met these objections by adopting the only alternative, the *registered voter,* and provided that an election must be called

"upon the petition of one-third (1-3) of the registered voters of any city or town." They did not use the word "voters" alone, because it is co-extensive with qualified voters, and because it means, as the court defines it, "One who votes, one who is entitled to vote," and there would be difficulty in determining this question; but they qualified it with the word "registered," thereby intending that the registration books containing the names of the existing registered voters should be final in determining the number of citizens having the right to sign a petition.

3. Assuming that the board has the implied power to determine who have not paid the poll tax, I am convinced that, without any wrongful purpose on their part, they have mistakenly exercised such power in an illegal manner. Although this point was not argued before us, it arises upon the complaint for *mandamus*. Omitting the voluminous exhibits attached to the complaint, it is short and simple, and alleges that the board wrongfully refused to count 113 names rightfully on the petition. It is the duty of the court to consider any view of the law wherein the board may have erred in refusing to count those names. In *Scott v. Life Asso.*, 137 N. C., 521, this court based its judgment solely upon a view of the law not mentioned in the record, and upon entirely different grounds than those assigned in argument. In the first place I incline to the opinion that the board had no right to delegate its authority to a committee of two to pass on the fact of payment of poll tax. It is the exercise of practically a judicial function and the board should have passed upon the matter themselves by a majority in regular session. In the second place, if the board has this implied power, in its exercise they should pursue the method pointed out in the election law. The voter's right to petition being a statutory right, and in the opinion of the court dependent upon his right to vote, should be passed upon in the same manner as his right to vote. The board should have sum-

moned the 113 petitioners before them and called upon each to produce his tax receipt, or have given him the opportunity to take the oath I have quoted. It is not admitted in the complaint that these 113 citizens and registered voters or any of them have not paid their poll tax, and this plaintiff would have no right to make any such admission for them. Each petitioner has the personal right to have notice, be present and be heard when his individual right to sign the petition is contested upon such ground, as much so as when his right to vote is challenged at the polls on election day upon the same ground. Then he is present and is heard in defense of his legal rights. Such just and reasonable right has been denied by the defendant in this case to each of the 113 petitioners whose names were arbitrarily stricken from the petition. The court, in its opinion, says: "If it be conceded that the board of aldermen had no right to purge the registration lists, then clearly the *mandamus* could not issue, for the petition did not contain one-third of the names upon the registration list." This of course could only be true if the names of those who had not paid the poll tax are added to the registration lists, and those names on the petition who had not paid poll tax were not restored to the petition. If we restore the names to one, we must restore them to the other. It was admitted below, conceded here, and is expressly found by *Judge Justice* and acquiesced in by all, that if non-payment of poll tax was not a disqualification, then the necessary one-third of the voters had signed the petition. The count stands thus:

Original registration	1,826
Dead and removed	258
Registered voters	1,568
Necessary one-third	523

On petition	543
Names taken off by request	22
	521
Names added by request	13
	534
Excess on petition over one-third of registered voters	11

The above is the true estimate of those who are reported not to have paid poll tax and who are registered and on the petition. If they are excluded, then the petition lacks 16 of having one-third of registered voters.

In view of the report of the committee as to the examination of the tax lists, I am at a loss to understand the statement in the opinion that it does not appear that the tax list was the sole evidence before them. That is the plain statement in the report of the committee—*expressio unius est exclusio alterius.*

No one disputes the right of the board to purge the registration books of the dead and removed, but payment of poll tax not being a necessary qualification to register, the board has no right to purge the registration books of registered voters who are alleged not to have paid poll tax. Registrars and poll holders themselves cannot do that. How can it be logically said that a voter's name can be practically stricken from the registration books for the lack of a qualification not required to put it there?

In behalf of these 113 private citizens, whose legal rights have been denied them, and who have practically been declared disfranchised without notice, hearing or competent evidence, I enter my respectful dissent to the opinion and judgment of the majority of the court in this case.

I am authorized to say that *Mr. Justice Walker* concurs in this dissent.

BALL v. PAQUIN.

(Filed November 28, 1905).

Contracts of Married Women—Liability of Their Separate Real Estate—Liens for Labor and Material—Demurrers.

1. A demurrer that does not specify wherein the complaint fails to state facts sufficient to constitute a cause of action, is general and is not allowable.

2. A demurrer, on the ground that the *feme* defendant was a married woman, was properly overruled, where it does not appear, on the face of the complaint, that she was a married woman at the date of the contract or the commencement of the action.

3. A contract to pay for labor and material contracted for a dwelling on the wife's land (describing it) signed by husband and wife, acknowledged by them, and with privy examination of the wife, is binding upon her separate real estate under section 1826 of The Code by necessary implication, though she does not expressly charge it upon her estate.

4. By construing section 6 in connection with section 3 of Article X of the Constitution, and section 1826 in connection with section 1781 of The Code, a lien is given upon the property of a married woman for all debts contracted for work and labor done.

5. Discussion of the powers and rights of married women in respect to their property and contracts, with a criticism of *dicta* in certain of the decisions.

ACTION by Leroy Ball and another against Paul Paquin and wife, heard by *Judge M. H. Justice* and a jury, at the September Term, 1904, of the Superior Court of BUNCOMBE.

The plaintiffs allege that the *feme* defendant, Hannah B. Paquin, was on or before October 15, 1900, the owner of a lot in the city of Asheville, on Haywood street, known as the "Coffin lot;" that she and the male defendant had begun the erection of a house on the lot to be used as a residence, to be fitted up with lavatories and equipped with a steam-heat-

ing apparatus and a number of tubs for both hot and cold baths; that said residence is known as "The Halthenon;" that on October 15, 1900, the defendants entered into a contract with the plaintiffs, whereby the plaintiffs were to complete certain plumbing in the building. The terms upon which the work was to be done are set forth and the defendants "agree that upon completion of the work in a good workmanlike condition, they will pay to the said parties of the second part the contract price for the same, as hereinbefore set forth."

The plaintiffs were permitted to amend in this court by alleging that said contract was in writing and was executed according to law, and that a charge and lien were created thereby on the land upon which the building was being erected. They allege that the work was performed and the materials furnished by them in accordance with the contract; that defendants made payments on the contract price, leaving due thereon at the time this action was instituted the sum of $1,337.04; that prior to the commencement of this action, the plaintiffs filed a lien on the lot and building, in the office of the clerk of the Superior Court, in accordance with the Constitution and laws of the State, a copy of the lien is attached to the complaint. They demanded judgment for the balance due and the enforcement of the lien.

Defendants answered, saying that they had no knowledge or information sufficient to form a belief as to the allegation in regard to the partnership of plaintiffs; that the male defendant had no interest in the real estate other than as husband of the *feme* defendant. They deny the other material allegations of the complaint and for a further defense say that the defendant, Paul B. Paquin, entered into the contract with the plaintiffs by which they were to do "the plumbing on the building which was being erected on the property of the defendant, Hannah B. Paquin, on Hay-

wood street." They allege that the work was not done according to the contract, and that by reason of the failure to do so the defendants have sustained damage, etc., demanding judgment against the plaintiffs for $443, amount overpaid, and $1,000 damages sustained by the defendants. The plaintiffs filed a reply to the counterclaim. The pleadings are verified.

The defendants upon the opening of the cause demurred *ore tenus* to the complaint for that it did not set forth facts sufficient to constitute a cause of action. His Honor reserved the question raised by the demurrer and submitted a series of issues to the jury, presenting the controverted questions of fact. The defendants tendered the general issues, which His Honor declined to submit, and they excepted. The jury found upon the issues that the plaintiffs furnished, after October 15, 1900, material and labor on the building, the cost price and value of which was $1,222.39; and that the defendants were entitled to recover $50 on their counterclaim. From a judgment on the verdict, the defendants appealed.

Tucker & Murphy for the plaintiffs.
Merrick & Barnard for the defendants.

CONNOR, J., after stating the facts: The demurrer is general in that it does not specify wherein the complaint fails to state facts sufficient to constitute a cause of action. This, under The Code practice, is not allowable. His Honor could have overruled it for that cause. *Elam v. Barnes,* 110 N. C., 73. We assume, however, that the real ground of the demurrer was that the *feme* defendant was a married woman. *Baker v. Garris,* 108 N. C., 218.

The difficulty encountered by the defendant is that it does not appear, on the face of the complaint, that she was a married woman at the date of the contract or the commencement

of the action. The pleaders appear to have carefully avoided this allegation. His Honor properly overruled the demurrer.

The *feme* defendant does not plead her coverture, nor does it appear by the answer that she is *covert,* except that the male defendant informs the court that nothing can be made out of him because he has no interest in the dwelling house and lot, save as the husband of the *feme* defendant. He says, however, that he alone contracted for the work on the house which the written contract declares was being erected, "by the said Hannah B. Paquin." How all of this is we do not know, except as the jury have found.

The plaintiffs put the contract of October 15 in evidence by which it appears that they had theretofore furnished some material and done some work for the defendants on the dwelling on the lot of the *feme* defendant "in the city of Asheville, on Haywood street, known as the 'Coffin Lot,'" being erected by the said Hannah B. Paquin. The terms upon which the balance of the work is to be done and material furnished are set forth, and the defendants promise to pay promptly the amount due on the contract. It is signed by the defendants, acknowledged by them, and the private examination of the *feme* defendant taken and certified by a notary public in the manner and form prescribed for executing deeds of conveyance of real estate. The jury have found that there is due the plaintiff for material furnished and work done on the dwelling, since the execution of the contract, the sum of $1,337. In this court the plaintiffs were permitted to amend the complaint to correspond with the proof.

The defendants contend that they may have, use and enjoy the labor and material furnished, by which the dwelling is supplied with lavatories, hot and cold baths, and pay nothing for it; that the right to do all of this is secured to them by the Constitution and laws of this State, because the property is the separate estate of the *feme* defendant. If this con-

tention is correct, it would seem that our Constitution and laws are sadly in need of radical amendment.

The appeal renders it necessary to examine the statutory law and decisions of this court relied upon to sustain the defendant's exception to the judgment. It would serve no good purpose to review the numerous cases which have been before this court, in which creditors have endeavored to collect debts from married women. The construction of the Constitution and laws has received the most anxious and careful consideration of the judges who have sat upon this bench. We find that the same effort has been made in England and in many of the States of the Union to break away from the common law conception of the status of married women, in regard to their property rights and contractual capacity. An interesting history of the course of parliamentary and judicial thought and action on the subject is given by Professor Dicey in "Law and Opinion in England," 369; Pomeroy's Eq., section 1098, *et seq.* (3 Ed.), Mr. Bishop, volume 1, section 847, says: "That since the confusion of tongues in the Tower of Babel, there has been nothing more noteworthy in the same line than the discordant and ever shifting utterances of the judicial mind on the subject." *Flaum v. Wallace,* 103 N. C., 306. It is but natural and not to be regretted that under our system of jurisprudence, in which, by the operation of three agencies, legal fiction, equity and legislation, the law is brought into harmony with society (Maine Anc. Law), the movement is slow and at times unsatisfactory. In no court in this country was the common law conception of the marital relation, with all of its incidents, more clearly and tenaciously retained than in ours. Prior to 1848 we find no statute interfering with or limiting the common law right and power of the husband over his wife's property. In respect to dower, the law was so changed that the husband could sell his land without her consent and deprive her of

"her third." This was changed by the Act of 1866-'67 and dower as at common law restored.

It is therefore not unnatural that when, by the Constitution of 1868, an entirely new theory was adopted by which it is declared that "the real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such female," etc. (Const., Art. X, sec. 6), the court should have moved with caution in giving it operation.

It would seem that this language carries with it, as an essential attribute of ownership of the wife, the power to deal with and make contracts in regard to such property, except as expressly restricted by the same instrument, as a *feme sole*. This was clearly intimated in *Withers v. Sparrow*, 66 N. C., 129. That expression was doubtless taken as an indication that this court would so hold, when the question was fairly presented. At the session of 1868-'69 we find no legislation upon the subject of married women. The effect of the holding, as foreshadowed in *Withers v. Sparrow, supra*, would have been to adopt the English and New York doctrine, by which a married woman could contract with respect to her separate estate as a *feme sole*. At the session of 1871-'72, chapter 193, an act was passed "concerning marriages, marriage settlements and the contracts of married women." The act is comprehensive in its scope and evidently drawn with care. The subject matter, as published in the Public Laws of 1871-'72, is classified under "headings," the third being, "What contracts a married woman may make with strangers." Section 17 (being section 1826 of The Code). "No woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses or the support of her family, or such as may be necessary

in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed." It would seem that the Legislature enacted this statute with full recognition of the radical change made by the Constitution, and the clear suggestion by the court that the power to contract, as a *feme sole,* was conferred as a necessary incident to the power to own property "as if unmarried." It was not supposed that the words "devise" and "with the written assent of the husband convey," used in the Constitution, referred to her power to enter into executory contracts. For the purpose of throwing around her the protection of her husband's counsel and advice, the Legislature declared that, with certain exceptions, she should not contract "without the written consent of her husband." In the absence of controlling decisions to the contrary, we should unanimously hold that she could make all manner of contracts with the written assent of her husband, and that for breach of them her property was liable as if she were a *feme sole.* The cases which came to this court during the years 1868-1876 clearly indicate that such was the construction of the statute by the profession and laymen.

The first case is *Harris v. Jenkins,* 72 N. C., 183 (1875). The *feme* plaintiff signed a sheriff's bond as security without the written assent of her husband. The case came clearly within the words of the Act of 1871-'72, and the court did not hesitate to hold that she was not bound.

Pippen v. Wesson, 74 N. C., 437 (1876), presented the question for the first time, whether under the Constitution and the Act of 1871-'72 a married woman could, with the written assent of her husband, enter into an executory contract for breach of which she could be sued to judgment, and her property subjected to sale under final process. It will be noted that the statute uses the word "contract." There is no suggesstion therein of any other form of obliga-

tion or remedy for breach thereof. This court held that no power to enter into an executory contract was conferred by the Constitution or statute on a married woman; that the only change made in her contractual capacity was that her separate estate, formerly called her equitable separate estate and property secured by the intervention of a trustee, was by the Constitution made her statutory separate estate, her husband occupying the position of trustee; that the only way in which such separate estate or property could be subjected to her engagements, even with the written assent of her husband, was by a specific charge or by showing a beneficial consideration; and that thereby her separate estate was charged with her obligations, not upon the theory that she had contracted a debt, but that her engagement, thus made, constituted a charge which the courts of equity had theretofore enforced.

It is not our purpose to do more than say that this decision was based upon the view that neither the Constitution nor the statute enlarged her common law contractual capacity, and that the statute was disabling rather than enabling in its provisions, except as to the class specified. Whatever, in the light of thought and experience of thirty years, may be said of this decision, it became the accepted law of this State, and its fundamental principle with some modification, has been followed. A number of important and disturbing results have flown from it. A constant struggle has been going on to find some adjustment of the law to the inevitable result of the radical change made by the Constitution. Married women today are the owners of property, both real and personal, worth millions of dollars. They employ tenants and croppers and cultivate thousands of farms, engage in merchandise, conduct hotels, boarding houses and almost every kind of business suited and sometimes unsuited to their mental and physical capacity. The largest possible powers have been conferred upon them in

respect to the control of their property, as in *Manning v. Manning,* 79 N. C., 293, and many other cases. It has been found by an experience of thirty years that the most unexpected and often startling results have come from this condition. As a matter of every day experience, we know that a very large portion of the industrial and commercial life of the State is under the control and subject to their judgment and opinion. It is possible that nine-tenths of the contracts entered into by them are not enforcible in the courts.

In *Harvey v. Johnson,* 133 N. C., 352, upon a review of, and in accordance with all former decisions, this court held that a note executed by husband and wife, charging her separate estate, is sufficient to bind her separate personal property; that in the absence of a privy examination it did not bind her separate real estate. In that case it appeared that the consideration enured to the benefit of her estate.

In *Flaum v. Wallace, supra,* such a note was held binding on her separate personal estate, although not for her benefit. This court took one step forward in the enfranchisement of married women by holding, in a well considered opinion, in *Vann v. Edwards,* 135 N. C., 661, that the restriction upon her right to convey her land, requiring the written assent of her husband, did not apply to her separate personal estate; hence, it is now the law of this State that she can sell and transfer her personal property as a *feme sole.*

It is unnecessary to make further reference to the numerous decisions of the court in which her power to deal with her separate personal estate is discussed. *Flaum v. Wallace* and *Vann v. Edwards, supra,* settle her rights in this respect.

It is said, however, that a different principle obtains when it is sought to subject her separate real estate to her contractual obligations. While expressions had been used by some of the judges indicating an opinion that she could do so only by a contract executed with the formalities pre-

scribed for the conveyance of her land, no *decision* was made to that effect until 1890, when the question underwent a careful and thorough consideration in *Farthing v. Shields,* 106 N. C., 289. There, *Mr. Justice Shepherd,* referring to *Flaum v. Wallace,* said: "We were greatly influenced in so holding because of the power of the wife to absolutely dispose of her statutory separate personal estate by the simple assent of her husband, and we deemed it but reasonable that if she could so absolutely dispose of such property, she might exercise the lesser power of charging it, either expressly or by necessary implication. But when we come to the statutory separate *real* estate, the foregoing reason fails, because under our statute law, the wife and husband cannot dispose of such property unless the former has been privately examined, separate and apart from her husband." The learned justice concludes that the power to charge her separate estate is measured by her power to dispose of the same; hence, if she had expressly charged the debt in that case with the written assent of her husband, "it would have been of no avail without privy examination." In further discussing the law he says that the lands of a married woman cannot be charged by any undertaking on her part "unless it be evidenced by deed with privy examination." This, for the reason that she will not be permitted to do indirectly what she cannot do directly. *Scott v. Battle,* 85 N. C., 184. Similar expressions are used in *Thurber v. LaRoque,* 105 N. C., 301; *Williams v. Walker,* 111 N. C., 604; *Loan Asso. v. Black,* 119 N. C., 327; *Bank v. Fries,* 121, N. C., 241. In *Weathers v. Borders,* 121 N. C., 387, the contract was not in writing and of course there was no privy examination. The expression that she could only charge her real estate by "a regular conveyance executed as required by the statute," etc., was not necessary to the decision of the case and, as we have seen, is not required by any *decision* of this court. When the question came directly before the

court, it was said that the cases did not hold it to be necessary that a mortgage should be executed. *Banks v. Ireland,* 122 N. C., 571.

It will be found in all these cases that the question whether it was necessary that the form of the contract should be a conveyance, was not presented. It is evident that the judges were referring to the formalities with which such contracts should be executed. In *Bank v. Howell,* 118 N. C., 271, it is said that she cannot charge her separate real estate "except upon privy examination." In *Bank v. Ireland,* 122 N. C., 571, the present *Chief Justice,* writing in that respect for a unanimous court, referring to *Farthing v. Shields, supra,* and other cases, said: "Those decisions do not require that the charge shall be made by mortgage." In so far as it was intimated that no privy examination was necessary, the then chief justice and other justices did not concur.

The conclusion is irresistible that where the contract has all of the elements required by the statute and is reduced to writing, assented to by the husband, and the wife is privately examined separate and apart from her husband, it is binding upon her separate real estate. In this record we have such a contract, executed with all the formalities required for conveying the property, describing it with sufficient certainty to convey, the consideration clearly set forth, admittedly for the improvement of her separate real estate. Why is such estate not bound for the breach of her express contract, by necessary implication? It is true that she does not expressly charge it upon either real or personal estate, but she refers to her separate real estate, describing it as her property, and stating that she is erecting a dwelling thereon, and that the work and material contracted for are for such dwelling. Language not so strong was held in *Bates v. Sultan,* 117 N. C., 94, sufficient to charge her personal estate. *Brinkley v. Ballance,* 126 N. C., 393.

The decisions, while not in all respects harmonious, indi-

cate a movement of the court towards bringing the law in this respect into harmony with our social, industrial and commercial conditions. The Legislature has to some extent responded to this demand. In so far as it is within our province to do so, we desire to express our opinion that it is desirable that the Legislature simplify the subject by giving to married women full power to enter into executory contracts, binding their property, real and personal, "as if unmarried"—removing all doubt and uncertainty either as to the form of the contract, its execution, or remedy for breach.

How far they should be restricted or protected by requiring the assent of the husband is worthy of the most careful consideration. It is manifest that the court, in its desire to so construe the statute as to prevent injustice and wrong, has been hampered by the early decisions made when we were passing from the old into the new conception of the status of married women, in respect to their rights of property and power to contract. The wisdom of the experiment was seriously doubted by many of our wisest men, both lawyers and laymen. It was probably well, when confronted with two cases in which married women had signed bonds as security, that the court should move cautiously.

We do not feel at liberty, nor is it necessary in this case, to overrule any of the *decisions* made in this court upon the subject. This, with the exception of *Bank v. Ireland, supra,* is the first case in which an executory contract was executed by the wife with privy examination. She was held liable there, because there was an express charge. In this case, in which the contract is executed with privy examination, we hold that she is liable upon an implied charge upon the separate real estate. We have not overlooked *Daugherty v. Sprinkle,* 88 N. C., 300, nor *Thompson v. Taylor,* 110 N. C., 70. In neither of these cases was there any express contract by the married woman.

We are of the opinion and so hold that upon the pleadings

and contract, His Honor correctly held that the separate real estate of the *feme* defendant was bound for the amount found to be due by the jury. The plaintiffs are entitled to enforce their lien on her property. This court in *Thompson v. Taylor, supra,* said that the lien, given by the Constitution and statute for work and labor done and material furnished, was predicated upon a valid contract, and, as a married woman had no capacity to make such a contract, her property could not be subjected to such lien. This was not the point in the case. The *feme covert* had not made any contract, either express or implied. In *Smaw v. Cohen,* 95 N. C., 85, it was held that an action against a married woman to enforce a lien for an amount less than $200 was within the jurisdiction of a justice of the peace. This court, as we construe the opinion, did not pass upon the validity of the contract. *Mr. Justice Shepherd,* in *Farthing v. Shields, supra,* intimated that the lien could be enforced upon a simple contract by the married woman because of the lien law. However this may be, we are of the opinion that by construing section 6 in connection with section 3 of Article X of the Constitution, and section 1826 in connection with section 1781 of The Code, the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman.

It is true that the lien is given for the amount due upon debts contracted. In this connection it is permissible to give the term "contracted" the larger meaning—agreed to be paid—thereby giving a highly remedial statute an operation commensurate with its purpose. The provisions for the mechanic's and laborer's lien and for securing to the married woman her property, are found in the same article of the Constitution. In this case, the principle *noscitur a sociis* is invoked to ascertain the intention of the law maker. Sutherland Const. Stat., section 414, *et seq.* It has been held by many courts that when a married woman was empowered to

contract for the benefit of her separate estate, the lien for debts contracted for that purpose attaches. Boisot Mech. Liens, section 271; Philips on Mechanic's Liens, section 96; *Carthage M. & W. Co. v. Baumann,* 44 Mo. App., 386. In *Stephenson v. Ballard,* 82 Ind., 87, it is held that a statute forbidding a married woman to encumber her separate estate, except by deed with her husband, must be so construed in connection with another statute giving a mechanic's lien as to give effect to the latter. *Greenough v. Wigginton,* 11 Iowa, 435; Appeal *Germania Savings Bank,* 95 Pa. St., 329; *Kuhas v. Turney,* 87 Pa. St., 497. However this may be, the Act of 1901, chapter 617, expressly extends the lien law to the property of married women. It has been sustained in *Finger v. Hunter,* 130 N. C., 529.

We think that in the light of the authorities and upon the reason of the thing, the judgment can be sustained upon either view, that under the Act of 1871-'72 (Code, section 1826), the *feme* defendant is liable, and that upon a proper construction of the lien law, she is equally so.

We have examined the exceptions in the record to rulings of His Honor during the trial and do not find any error. We have taken this case under advisement from the last term and given to it our most serious consideration. We hope that the subject of the powers and rights of married women in respect to their property and contracts, may attract the attention of the General Assembly and be brought into harmony with the best modern thought and conditions. The judgment must be

Affirmed.

CLARK, C. J., concurring: The Code, section 1826, expressly provides that a married woman can *contract* and thereby "affect" both her personal and real property, requiring only in some cases her husband's "written consent" and dispensing with it in others.

There is no need in this case to discuss the doctrine of "implied contracts," for here the wife made an express contract, and in writing, with the plaintiff to place these improvements upon her property. The statute does not require her privy examination, for this was not a conveyance of her property, but only a contract. Her privy examination, however, was in fact taken. The husband's written consent under The Code, section 1826, is amply evidenced by his joining in the contract. *Jones v. Craigmiles,* 114 N. C., 613.

The status of married women in North Carolina is very clearly stated in the Constitution and laws as written by the Convention and General Assembly and may be thus succinctly summed up:

Property Rights: The property, real and personal, of a married woman, whether acquired before or after marriage, "shall be and remain the sole and separate estate and property of such female." Const., Art. X, section 6.

Right to Devise and Bequeath: By the Constitution this right cannot be restricted.

Conveyances: The only restriction placed by the Constitution upon conveyances by the wife is that there must be "the written assent" of the husband. Const., Art. X, section 6. Her privy examination is required by the Constitution only as to a conveyance of homestead by the husband (Const., Art. X, section 8), not as to conveyances by her. The statute, Code, section 1256, requires her privy examination as to any conveyance of realty.

Transfer of Personalty: There is neither written assent of the husband nor privy examination required as to the disposal by sale, gift or otherwise, by a married woman of her personal property. *Vann v. Edwards,* 135 N. C., 661.

Contracts: There is in the Constitution no restriction upon the power of a married woman to contract, and as her property rights remain as if she were single, with power to devise and bequeath it, and to dispose of it by sale, gift or

otherwise, save that the "written assent" of the husband is required as to conveyances of realty, it would seem it was intended that she should be free to contract. But The Code, section 1826, provides that she can make any contract whatever "with the written consent" of her husband, though this requirement of written consent is entirely dispensed with as to contracts for her necessary personal expenses, or for support of the family, or to pay her ante-nuptial debts, or when she is a free trader (Code, section 1830,) or lives separated from her husband or is abandoned by him. Code, sections 1831 and 1832. To avoid palpable fraud the written consent of the husband has further been dispensed with by chapter 617, Laws 1901, in cases (like the present) where buildings are placed or repaired on the wife's land by her consent or procurement. *Finger v. Hunter,* 130 N. C., 529.

Such is the law as the lawmaking power has made it. It is plain and simple and reasonably abreast with the spirit of the age, though in England, New York, and in most other States, the statute law does not add (as we have done) to the plain provisions of our Constitution a requirement of privy examination as to conveyances of realty and of written consent of the husband as to some contracts. 1 Am. & Eng. Enc. (2 Ed.), 522. In none of the States adjacent to us—Virginia, South Carolina, Georgia and Tennessee—is the privy examination of the wife now required in any case whatever. It is a useless and troublesome formality handed down from the past and of most doubtful constitutionality under a Constitution which requires only the written assent of the husband to the wife's conveyances as the sole modification upon her property rights, as a *feme sole*, and which expressly provides that with such assent her property may be "conveyed by her as if she were unmarried." Const., Art. X, sec. 6.

By our Constitution and laws the status of married women is thus very plain. There is required by the Constitution only the written assent of the husband to conveyances by the wife and the statute requires privy examination of the wife only to

convey realty, and written consent of the husband as to the wife's contracts, except those cases specified as to which the written consent is dispensed with. That is all. Turning to 128 N. C., there will be found at pp. 431-435, in four pages of fine type, the tables wherein Professor Mordecai has endeavored in vain to draw some order out of the confusion caused by the doctrine of "charging in equity." As was said by this court in *Brinkley v. Ballance*, 126 N. C., 396, "An examination of the Constitution, Article X, section 6, and of the statute (Code, section 1826), shows no foundation for the 'charging' the wife's property. The Constitution requires only the written assent of the husband to 'conveyances' and section 1826 requires only 'the written consent' of the husband to contracts affecting the wife's real or personal estate in certain cases, dispensing with it in others." There is no statute which authorizes or recognizes a *feme covert* "charging her property in equity."

The Statute (Code, section 1826,) requires no more as to the contract of a married woman, in any case whatever, than the "written consent" of the husband, and dispenses with even that in many cases. The courts should not require what the law does not. As *Judge Daniel* well said, "The Court cannot be wiser than the law." The sooner they are in harmony, the better.

Overruling the doctrine of "charging in equity," cannot possibly affect any rule of property, for to do so will not affect any title. It will not invalidate, but recognize as valid, contracts when made as the law requires "with the written consent of the husband." In this connection, my attention has been called to the dissenting opinion in *Zachary v. Perry*, 130 N. C., 292. It is needless for me to say that no sort of discourtesy was intended towards the distinguished justice who wrote the opinion in *Flaum v. Wallace*. The phrase "charge in equity" there used, was not a quotation from that opinion.

BROWN, J., concurs in result.

CALDWELL v. INSURANCE CO.

(Filed November 22, 1905).

Insurance—False Representations by Agent—Measure of Relief—Estoppel—Instructions.

1. In an action to recover premiums paid on a life policy, a demurrer to the evidence was properly overruled when it appeared that the plaintiff, an illiterate colored woman, was induced to take a policy upon the false representation of defendant's agent that she could draw out and get the amount due her at the end of ten years.

2. The instruction that "If you find that there was fraud in the transaction and that afterwards the plaintiff ascertained that the policies were not what she contracted for with the agent, and that after this she went on and paid the premiums and kept her life and the lives of the others insured and took the benefit, then she could not raise this question of fraud, although there may have been fraud in the beginning, unless you further find that the defendant's collecting agent and local superintendent lulled her into security and led her to believe that she would get the face of the policies at the end of ten years, or unless she paid the premiums under protest," is supported by the evidence.

3. In an action to recover insurance premiums, where the verdict establishes the fact that the insurance was obtained by the false representation of defendant's agent, the measure of relief is the amount paid with interest.

ACTION by Dinah Caldwell against Life Insurance Co. of Virginia, heard by *Judge M. H. Justice* and a jury, at the March Term, 1905, of the Superior Court of MECKLENBURG. From a verdict for the plaintiff, the defendant appealed.

The plaintiff alleges that sometime during the year 1895 she was induced by the representation made to her by defendant's agent, to take out policies upon her own life and the lives of her children, in defendant company. That the agent represented to her as an inducement to take out said policies, that at the end of ten years she could withdraw the

amount due her. That, after paying the premium on said policies for a number of years, she learned that she was not entitled to withdraw her money at the end of ten years, as represented. She charges that the representations upon the faith of which she took out the policies, were false and fraudulent and that she was deceived by them. She demands the return of the money paid by her, etc.

Defendant company denies the material allegations of the complaint and avers that if she was misled by any statements made by the agent at the time the policies were issued, she soon thereafter had full knowledge thereof and continued to pay the premiums, whereby she waived any right which she may have had and ratified the contract as it was made and set out in the policies; that she failed to pay the premiums in accordance with the terms of the policies and forfeited the amount paid. The case was submitted to the jury upon a single issue. From a judgment following a verdict for the plaintiff, defendant appealed.

Plummer Stewart and *C. D. Bennett* for the plaintiff.
W. B. Rodman for the defendant.

CONNOR, J., after stating the case: The testimony on the part of the plaintiff tends to show that she is an illiterate colored woman, having ten (10) children. That sometime during the year 1895, while she was engaged as a cook at the Buford Hotel in Charlotte, the superintendent of the defendant company sent for her to come to his office. That upon going to the office he asked her if she had any objection to being "written up," to which she replied that she knew nothing about it—did not know what insurance meant. He said that he would tell her, to which she replied that if he did, she would know nothing about it then, to which he replied, "You will have a nice hearse, nice carriage and a nice funeral." She said, "I can't feel the ride in the

hearse and I can't see the funeral procession." He said, "You will have a heap of money," to which she responded, "I don't want the money if I'm dead. I have got to go to work at 3 o'clock in the morning and am not going to take my money to pay insurance." He said, "I will tell you what you can do. You can come in for ten years and after ten years you can go out." She said, "I don't know anything about this. I have been living with white people ever since I was born. I don't know anything about it and I don't want to fool with it." He said, "Aunty, you can go in for ten years." He said, "That after ten years I could draw out the claim and if anything happened to me the claim would be paid." That, upon the faith of these representations, she took the policies, paying for some years the weekly instalments or premiums thereon. That sometime thereafter a lady with whom she was employed read the policies and in consequence of what she said to plaintiff she saw Col. Jones, a lawyer in Charlotte. That she afterwards went to the agents of the company and complained that the policies were not as represented. Some of the policies were taken up and others given her in their stead. That after much going and coming, she refused to pay any further premiums. She told the agent that her time was up, and he told her that if she got anything she would have to get it by law. We have not set out all of the testimony of the plaintiff; that portion which we have set forth, and there was nothing in her testimony contradictory thereof, shows the gist of the transaction. Defendant demurred to the evidence and moved the court to dismiss the action. We concur with His Honor in his refusal to grant the motion. There was ample evidence that the plaintiff was led to believe that she could "draw out" at the end of ten years. She had in her own, but unmistakable way, refused to be beguiled by the attraction held out to her, regarding a fine funeral and a "heap of money" at her death. It was only when the agent

held out the inducement that she could "draw out" which she understood, and he must have intended that she should understand, to mean getting the amount due her at the end of ten years, that she consented to take the policies, or, as the agent expressed it, "be written up."

In what way, other than receiving the amount due her at the end of ten years, was she to "draw out" her claim, at the end of that period? It is hardly probable that it was in the mind of the agent to gain her confidence and secure her application by assuring her that, if at the end of ten years she grew weary of paying the weekly instalments, she should have the privilege of drawing out empty handed, leaving the whole amount paid in the vaults of the company. She does not appear to be a person who would consent to be "written up" on such terms. If her testimony is true, she was induced to insure upon the representation made to her, as an inducement, that in her old age she would reap the fruits of her industry and economy during the ten years. Her testimony in this respect is uncontradicted; the superintendent, with whom she had the conversation, was not introduced. His Honor carefully and correctly explained to the jury the law governing the case, placing upon her the burden of proof in the strongest language which this court has approved in cases where mutual mistake was alleged. He said: "The burden is upon the plaintiff to show by clear, strong and convincing proof that this transaction was fraudulent and that she was making these payments under representations made by the defendant that were not true. The burden, I say, is on the plaintiff to satisfy you that this was a fraudulent transaction." He instructed the jury, at considerable length, what constituted fraud in a transaction of this character, at all times putting upon the plaintiff the burden of proof. We find no error in this respect. He further charged them: "If you find that there was fraud in the transaction and that afterwards

the plaintiff ascertained that the policies were not what she contracted for with the agents, and that after this she went on and paid the premiums and kept her life and the lives of the others insured and took the benefit, then she could not raise this question of fraud, although there may have been fraud in the beginning, unless you further find that the defendant's collecting agent and local superintendent lulled her into security and led her to believe that she would get the face of the policies at the end of ten years, or unless she paid the premiums under protest." To the last clause of this instruction the defendant excepted for that there was no evidence that she paid under protest. Without undertaking to set forth the testimony, it is sufficient to say that we have given it a careful examination and find that when she first learned that there was something wrong with her policies she endeavored to get them straight, without success. She says that she would go to one agent and he would send her to another and this course was continued until they finally cancelled the policies. She narrates her trials in her own simple and natural way, showing that she was bewildered in the intricate mazes and confusing obscurities of life insurance policies. In this respect she is not singular. In the only way open to her she was constantly protesting that something was wrong about her insurance. She does not appear to have received much light from the source to which she went and was entitled to go. There was ample evidence to sustain His Honor's charge and the verdict of the jury. She proved an excellent character; her testimony both in manner and matter was well calculated to carry conviction to the minds of the jurors. The plaintiff is evidently one of the few remnants of a type of her race illustrating its highest virtues. In the simple duties of life incident to her station, she exhibits a store of saving common sense, when sought out and invited by an insurance agent to visit his office and

discuss the most intricate, promising and sometimes disappointing mode of investing surplus earnings, she tells the agent that she knows nothing of it, and will know nothing when he has illuminated the subject, it is not strange that she gets into trouble. She could not read the policies and it is no serious reflection upon her intelligence to surmise that if she could have done so, she would not have been very much wiser. She did resist the blandishment to which those of her race usually succumb—"a nice funeral"—nor did she surrender to the persuasive assurance for which many accredited with more wisdom, spend a life of slavery, "a heap of money" at her death. There is a vast deal of sound philosophy and sense in the answers made by her to the agent. When, however, the appeal is made to that fear which so constantly throws its dark shadows over human life, poverty in old age—and the assurance is given, as found by the jury, that at the end of ten years she could draw out her claim, she consents to "be written up." His Honor correctly announced the law which gives relief, the jury upon ample evidence have found the facts as testified by the plaintiff. It is admitted that the policies do not entitle her to receive the amount paid in or any other amount at the end of ten years; that on the contrary, she forfeits all that she has paid. Upon the verdict the law declares that as she cannot have what was promised to her, she must have her money back with interest. If the defendant has been compelled to carry the risk during the life of the policies without compensation, it must look to its accredited agent, whom the jury finds made the false representation. This court has uniformly held that in such cases the measure of relief is the amount paid with interest. *Braswell v. Ins. Co.*, 75 N. C., 8; *Lovick v. Ins. Ass'n,* 110 N. C., 93; *Makely v. Legion of Honor,* 133 N. C., 367.

The judgment must be

Affirmed.

GATTIS v. KILGO.

(Filed November 22, 1905).

Slander and Libel — Privileged Occasions — Absolute and Qualified — Question for Court — Effect of Privilege — Malice—Question for Jury.

1. The investigation of charges against the president of a college before its board of trustees is not absolutely, but qualifiedly privileged and so is the publication of the proceedings in pamphlet form, which was intended for circulation among the patrons of the college and those likely to become its patrons.

2. Any statement or communication is conditionally privileged when made *bona fide* about something in which (1) the speaker has an interest or duty; (2) the hearer has a corresponding interest or duty; and (3) when the statement or communication is made in protection of that interest or in performance of that duty.

3. The standard of privilege is the standard of the law, not of the individual, and the privilege depends not on what the individual may have supposed to be his interest or duty, but upon what a judge decides, as a matter of law, his interest or duty to have been.

4. The effect of the privilege is to cast upon the plaintiff the burden of showing malice on the defendant's part in uttering or publishing the alleged slanderous words.

5. If one exceeds the privilege, its protection to him ceases and the ordinary rules of liability apply.

6. Whether one has exceeded the privilege and whether he was actuated by malice are ordinarily questions for the jury.

7. Proceedings before school boards, religious, fraternal and like organizations, are within the class having only a qualified privilege and are protected by such privilege when it is properly used and not abused.

8. Absolute privilege is generally confined to judicial and legislative proceedings and official communications of a public nature, where the interest of the public is directly concerned.

GATTIS *v.* KILGO.

ACTION by Thos. J. Gattis against J. C. Kilgo and B. N. Duke, heard by *Judge Fred Moore* and a jury, at the June Special Term, 1905, of the Superior Court of WAKE. From a judgment of nonsuit, the plaintiff appealed.

Graham & Devin, Guthrie & Guthrie, Argo & Shaffer, C. B. Watson, A. A. Hicks, S. M. Gattis and *J. N. Holding* for the plaintiff.

R. W. Winston, B. S. Royster, T. T. Hicks, F. L. Fuller and *Aycock & Daniels* for the defendants.

Per Curiam: The court is of the opinion that the investigation of the charges against defendant Kilgo before the board of trustees of Trinity College was not absolutely, but qualifiedly privileged, and so was the publication of the proceedings in the pamphlet, known in the case as the "Blue Book," which was intended for circulation among the patrons of the college and among those likely to become its patrons. Any statement or communication is conditionally privileged when made *bona fide* about something in which (1) the speaker has an interest or duty; (2) the hearer has a corresponding interest or duty; and (3) when the statement or communication is made in protection of that interest or in performance of that duty. It must be uttered in the honest belief that it is true. The standard of privilege is the standard of the law, not of the individual, and the privilege depends, not on what the individual may have supposed to be his interest or duty, but upon what a judge decides, as matter of law, his interest or duty to have been. The court determines what is and what is not privileged. The effect of the privilege is to cast on the plaintiff the burden of showing malice on the defendant's part in uttering or publishing the alleged slanderous words. If one exceeds the privilege, its protection to him ceases and the ordinary rules of liability apply. Whether he has exceeded it and whether he was

actuated by malice are ordinarily questions for the jury. 1 Jaggard on Torts, 530, 531. Proceedings before school boards, religious, fraternal and like organizations are within the class having only a qualified privilege and are protected by such privilege when it is properly used and not abused. 1 Jaggard, 539. Absolute privilege is generally confined to judicial and legislative proceedings and official communications of a public nature, where the interest of the public is directly concerned. 1 Jaggard, 526, *et seq.*

The plaintiff having declared on the publication of the pamphlet, must show that the defendants were prompted by actual or express malice in making the publication. There is no cause of action alleged against the defendant Kilgo for slander in making his speech before the board, nor is there any alleged against the defendants, Duke and Kilgo, for libel in publishing the speech in *The Morning Post* and other newspapers. Testimony as to the latter publication was introduced to show malice in publishing and circulating the pamphlets. A majority of the judges sitting are of the opinion that there is no evidence of malice as to the defendant Duke, and that there is no evidence that the defendant Kilgo participated in the publication of his speech in the newspapers. Upon the question, whether there is any evidence that the defendant Kilgo was actuated by malice in publishing the pamphlets, the judges are equally divided in opinion, two of the judges holding that there is evidence in the case, certainly when coupled with what was improperly excluded, which requires that the cause be submitted to the jury, and the other two judges holding that there is no such evidence.

It is not deemed necessary to review the evidence or discuss the case so far as the defendant Duke is concerned. No useful precedent would be furnished, as a case resembling this, even in its general features, is not apt to be again presented, and no new or important principle of law is involved. As to the defendant Kilgo it has not been usual to do more

than merely announce the result when there is a divided court, as diverse opinions of the judges in such a case could not possibly have the weight of precedents. There could be no opinion of the court.

Governed by the law, as determined upon the facts by a majority of the court in respect to the defendant Duke, and by the course and practice of this court (when its members are equally divided in opinion) in respect to the defendant Kilgo, we must affirm the judgment of the court below and the action will stand dismissed.

Affirmed.

CLARK, C. J., did not sit.

FITZGERALD v. CONCORD.

(Filed November 28, 1905).

Municipal Corporations—Defective Streets—Duty to Keep in Repair—Notice, Actual or Implied.

1. In an action against a city for personal injuries, where the evidence tended to show that the plaintiff was injured by falling through a culvert while walking along the streets of the city on a dark night and no lights on the street, that the culvert was considerably worn and covered with dirt, that the top planks were worn, sagged and broken and could be seen through and had been in this condition for several weeks before the plaintiff was hurt, and that she had not noticed this place before, *held*, that there was error in directing a nonsuit.

2. The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision.

3. The town does not warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town "knew or by ordinary diligence might have discovered the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated."

4. The use of ordinary diligence is required to detect defects from natural decay in wooden structures by making examinations, with reasonable frequency, to ascertain whether they are safe or not and knowledge of a defect may be inferred, notwithstanding it may have escaped the attention of all travelers, or even of an officer frequently passing by.

5. On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it had been in existence and use, the nature of the defect, its placing, etc.

ACTION by Rachel Fitzgerald against City of Concord, heard by *Judge M. H. Justice* and a jury, at the May Term, 1905, of the Superior Court of CABARRUS.

There was evidence of the plaintiff tending to show that she was injured while walking along the streets of Concord, by reason of falling through a defective culvert. The plaintiff herself, on the principal question, testified as follows: "I live on South Crowell street. On July 28, 1905, as I was going on my direct way home, down West Depot street and crossing the same, I entered South Crowell street on the bridge or culvert at the entrance of said street and fell into a hole in the culvert. The plank seemed to be partly broken. As I went down the planks held me fast and I could not get out. I fell with all my weight on my left foot, very badly spraining it, and injuring my hip. I pushed down the plank with my hand and crawled out, and crawled over to a store house at the intersection of the streets. By holding to the house and getting the support of a stick, I was able to get to a near neighbor's house and remained there during the night. The night was a very dark one and there were no lights on the street, as the storm had put them out. I had not noticed this place before in the street."

J. D. Gordon, a witness for the plaintiff, on his examination in chief, testified: "I do business at the intersection of West Depot and South Crowell streets. I knew the culvert in question; it was 16 or 18 inches in diameter. It was as long as the width of Crowell street and was over the ditch on the south side of West Depot street. It was about 20 feet long and was crossed by all who enter South Crowell street

from West Depot street. It was used by those who enter the street walking and in vehicles. The culvert was considerably worn and covered with dirt. The top planks were worn, sagged and broken, and could be seen through, and had been in this condition for several weeks before the plaintiff says she was hurt. South Crowell street is one of the principal streets in Concord. I saw the plaintiff afterwards and she was limping and is still limping."

On the close of the testimony for the plaintiff, on motion of defendant, there was judgment of nonsuit, and the plaintiff excepted and appealed.

W. G. Means and *M. B. Stickley* for plaintiff.
Montgomery & Crowell and *L. T. Hartsell* for defendant.

HOKE, J., after stating the case: There was error in directing a nonsuit in this case and the plaintiff is entitled to have her cause submitted to a jury. The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. Code, sec. 3803; *Bunch v. Edenton,* 90 N. C., 431; *Russell v. Monroe,* 116 N. C., 720.

In *Bunch's case, Merrimon, J.,* for the court, says: "It was the positive duty of the corporate authorities of the town of Edenton to keep the streets, including the sidewalks, in 'proper repair,' that is, in such condition as that the people passing and repassing over them might at all times do so with reasonable ease, speed and safety. And proper repair implies also that all bridges, dangerous pits, embankments, dangerous walls, and the like perilous things very near and adjoining the streets, shall be guarded against by proper rail-

ings and barriers. Positive nuisances on or near the streets should be forbidden under proper penalties, and, when they exist, should be abated."

The town, however, is not held to warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town "knew, or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated."

It will be observed that actual notice of a dangerous condition or defective structure is not required, but notice may be implied from circumstances, and will be imputed to the town if its officers could have discovered the defect by the exercise of proper diligence. As pertinent to the present inquiry, it is stated in 1 Shearman & Red. Neg., sec. 369: "Unless some statute requires it, actual notice is not a necessary condition of corporate liability for the defect which caused the injury. Under its duty of active vigilance, a municipal corporation is bound to know the condition of its highways, and, for practical purposes, the opportunity of knowing must stand for actual knowledge. Hence, when observable defects in a highway have existed for a time so long that they ought to have been observed, notice of them is implied, and is imputed to those whose duty it is to repair them; in other words, they are presumed to have notice of such defects as they might have discovered by the exercise of reasonable diligence." And again, in the same section: "It is only reasonable that notice of latent defects should not be so readily presumed from their continuance as open and obvious defects. If these were so dangerous as to challenge immediate attention, the jury is justified in finding a very short continuance of such condition to constitute sufficient notice. Active vigilance is

required to detect defects from natural decay in wooden structures, like bridges, plank sidewalks and the like, which will necessarily become unsafe from age, but the most that ought to be required is the use of ordinary diligence by making tests and examinations, with reasonable frequency, to ascertain whether they are safe or not. It has been held that notice will not be implied unless the defect was so open and noticeable as to attract the attention of passers-by. But travelers are not charged with any duty to search for defects in a highway as road officers are, and the better rule, in our judgment, is that knowledge of a defect may be inferred, notwithstanding it may have escaped the attention of all travelers, or even of an officer frequently passing by. It is not a question whether all passers-by actually notice a defect, but whether it was noticeable." And the decided cases support the doctrine as stated. *Jones v. Greensboro,* 124 N. C., 310, 313; *Kibele v. Philadelphia,* 105 Pa., 41; *Kunz v. Troy,* 104 N. Y., 346; *Pomfrey v. Saratoga, ibid.,* 459.

On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect, its placing, etc.

We have adverted only to the evidence most favorable to the plaintiff's demand, as this is required where a nonsuit is directed on the defendant's motion.

Applying the above principles to the testimony so considered, we are of opinion, as stated, that the plaintiff is entitled to have the question of the defendant's responsibility submitted to the jury under proper instructions from the court, and to that end a new trial is awarded.

New Trial.

ROSS v. COTTON MILLS.

(Filed November 28, 1905).

Master and Servant—Defective Appliances—Negligence—Res Ipsa Loquitur—Evidence—Question for Jury—Exceptions.

1. While the plaintiff was operating a lapper in a cotton mill it became choked and he stopped it with the belt shifter and put his hand into the beater bars to get the cotton out, and the machine, by some unknown means, started and tore his arm off, and there was evidence that the belt shifter was wider than the belt and that a piece of wood had been put on to make it correspond with the width of the belt, *held*, that the plaintiff, upon the doctrine of *res ipsa loquitur*, was entitled to have his case submitted to the jury.

2. The doctrine of *res ipsa loquitur* does not relieve the plaintiff of the burden of the issue, nor raise any presumption in his favor. The fact of the accident furnishes merely some evidence to go to the jury which requires the defendant "to go forward with his proof."

3. In an action for damages for personal injuries from a defective machine, it is essential to the plaintiff's recovery that there shall be evidence that the defendant had notice, or could, by reasonable care, have known, of such defect.

4. Where it does not appear what the appellant proposed to show by the rejected questions, this court cannot pass upon the exceptions to the trial judge's rulings.

ACTION by M. C. Ross against the Double Shoals Cotton Mills, heard by *Judge M. H. Justice* and a jury, at the Spring Term, 1905, of the Superior Court of CLEVELAND. From a judgment of nonsuit, the plaintiff appealed.

This is an action for personal injury sustained by plaintiff while operating a lapper in defendant company's mill.

Plaintiff introduced Alfred Gilliam, who testified that he was 67 years of age, had worked at defendant's mill since he

was 15 and up to two years ago. The lapper was purchased and put in mill six or seven years ago. Examined, and found to be very good, nothing wrong with it, was not new. It was a 36-inch lapper, had been taken out of a mill to give place to a 40-inch one, it run very well. The worm gear gave out and it gave trouble, a good deal first and last. The shaft, the coupling from the evenor plates broke once—was off when left there. The belt shifter fork was wider than the belt and I put on a piece of wood to make it correspond with the width of the belt. Think put the piece of wood next to the tight pully—am not certain; have worked in cotton mills 52 years, was superintendent of defendant mill 32 years. Nothing wrong with the machine. Evenor plates under the feed rolls—then the beater bars—two arms or bars. Beater shaft revolves 1,400 or 1,500 times a minute—bars cannot be seen when cap is down—arched cap on hinges. Could not get hurt when cap is down. Worm gear has no connection with beater or belting. If plaintiff got hurt by beater bars, the worm gear could not have affected it—stop motion rod has no connection with beater bar. Beater bars are stopped by throwing the belt from the tight to the loose pulley by means of the belt shifter. There is no danger of operating machine that I know of.

The shaft, pulleys, belt and belt shifter were brought into court and used by witness in explaining testimony to jury.

Plaintiff testified that he was hurt July, 1904, working for defendant. He had been a card hand—ran machine an hour and a half when it choked down and belt ran off big pulley. Carded the belt off and put belt grease on it to prevent belt from running off—ran five or ten minutes and choked again. Moved the belt shifter, stopped machine and carried two loads of cotton back to the hopper. Jim Champion came along, went to opposite side and raised cap from beater. "I put my hand over feed roll into beater bars to get cotton out. Machine started by some means and tore off my arm to my

elbow; knocked me numb or paralyzed. Had run lapper three months before I was hurt. Belt ran off pulley which runs beater when I got hurt. Am certain that I changed belt shifter and stopped machine when it choked, but cannot tell how it started. When I went to unclog it, know of nothing that could have put the belt on tight pulley." At the close of the evidence, defendant demurred and moved the court to dismiss the action. Motion allowed. Judgment and appeal by the plaintiff.

Webb & Mull and *D. F. Morrow* for the plaintiff.
O. F. Mason and *Ryburn & Hoey* for the defendant.

CONNOR, J., after stating the case: We did not have a model of the machine or any of its parts before us, by which to illustrate the testimony and argument. The plaintiff, in the employment of the defendant, was on the day of the injury operating a lapper in defendant's cotton mill. The motive power was applied by a belt running over a pulley on the machine attached to another pulley overhead working upon shafting connected with the power. When it was desired to stop the machine for any purpose, the belt was removed or shifted from the tight to the loose pulley by means of the belt shifter. If the machine became choked with the cotton passing through the beater, and it became necessary to clean it, or remove the cotton, it is stopped by throwing the belt from the tight to the loose pulley, this being done by a shifter. If in proper condition it will remain motionless until the belt is thrown back on to the tight pulley. While machine is in motion, there are parts in which the hand of the operator may be put without injury; there are other parts in which the beater shaft revolves very rapidly. Plaintiff's witness, Gilliam, says that two years ago when he left the mill that the lapper was all right and in good condition. The plaintiff says that on the 11th day of July,

1904, he was operating the lapper, that it became choked and "the belt ran off the big pulley," that he carded the belt off, put belt grease on it to prevent belt from running off. In five or ten minutes it choked again, that he stopped the machine with the belt shifter and carried some cotton back to the hopper. Champion went to the opposite side, raised the cap from the beater, and the plaintiff put his hand into the beater bars to get the cotton out. The machine, by some unknown means, started and tore his arm off.

The plaintiff's witness refers to some defects in parts of the machine which he says could not have had any connection with the plaintiff's injury. The immediate cause of the injury was that by some means the belt was thrown back on the tight pulley. The only testimony which throws any light on the condition of the belt shifter is that of Gilliam, who says, "the belt shifter fork was wider than the belt, and I put on a piece of wood to make it correspond with the width of the belt." There is no suggestion as to what effect, if any, this would have on the movement of the belt.

With the light afforded us, but one of three possible explanations of the unexpected starting of the machine occurs to our minds; either Champion accidentally struck the shifter and threw the belt on to the tight pulley, or the plaintiff, in moving about the machine, did so; or there was some defect in the belt or shifter.

It is elementary learning that the defendant is not liable for the movement of the belt, unless, either by the negligent conduct of some employee not a fellow servant or by some defect in the condition of the shifter, it worked back and threw the belt on to the tight pulley. In this condition of the case, what shall be done? The defendant has charge of the machinery and its operation except in so far as the plaintiff, in the discharge of his duty, had such charge. The plaintiff is suddenly and unexpectedly caught in the machine, struck dumb, his arm torn off, paralyzed. Conceding that

there is no direct evidence of a defect in the machine or any of its parts, is the plaintiff driven to a nonsuit, or may he, upon the doctrine of *res ipsa loquitur*, have his case submitted to the jury to say whether there be actionable negligence which is the proximate cause of his injury.

To prevent any misconstruction of the circumstances under which or the manner in which this principle applies in the trial of causes we wish to restate what was said in *Womble v. Grocery Co.*, 135 N. C., 474: "The principle of *res ipsa loquitur* in such cases carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not raising any presumption in his favor, but simply entitling the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence and say whether upon all of the evidence the plaintiff has sustained his allegation." It does not in any degree affect or modify the elementary principle that the burden of the *issue* is on the plaintiff. *Walker, J.*, in *Stewart v. Carpet Co.*, 138 N. C., 60, clearly states the law in this respect: "The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it. The fact of the accident furnishes merely some evidence to go to the jury which requires the defendant 'to go forward with his proof.' The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor." The suggestion has been made in argument of cases at this term, that when the rule applies it is the duty of the court to instruct the jury that proof which calls the rule into action constitutes a *prima facie* case or raises a presumption of negligence. This is a misapprehension both of the principle upon which the rule is founded and its application. It must be conceded that expressions are used in cases, some of which are cited in the opinion in *Womble's case*, *supra*, which give color to the suggestion. These cases were cited as illustrations of the rule; the author

of the opinion was not advertent, as he should have been, to this inaccuracy. The conclusion which is drawn from the cases, and quoted herein, does not contain the error. *Mr. Justice Walker,* in *Stewart's case,* puts the subject in its true light. So learned and accurate a jurist as *Judge Gaston,* in *Ellis v. Railroad,* 24 N. C., 138, being the first time that we find the rule declared in this court, refers to it as making out, when applicable, a *prima facie* case. *Smith, C. J.,* in *Aycock v. Railroad,* 89 N. C., 323, quotes with approval the language used in *Ellis' case, supra.* The correct application of the rule is as stated in *Stewart's case, supra.* In *Haynes v. Gas Co.,* 114 N. C., 203, the court held that permitting a live wire to lie upon the street was negligence—a breach of duty. In that case it was not necessary to invoke the rule. The defendant, by permitting the live wire to be upon the street, became liable for any injuries sustained thereby, unless it showed that it was there through no fault of its agents and servants. The learned *Justice* writing in that case was of the opinion that the rule applied. When, as in that case, a breach of duty is shown which is the proximate cause of the injury, a verdict follows for the plaintiff unless exculpatory circumstances are shown. It is only, as here, when there is no direct evidence of a defect in the machine, and the physical conditions surrounding the transaction do not ordinarily produce injury, that the occurrence speaks for itself. Such conditions are shown to exist in this case. A machine operated as this one with the adjustment of the belt, etc., does not ordinarily resume its motion after being disconnected with the motive power. The evidence shows that it did start suddenly, and, so far as the plaintiff is able to say, from an unknown cause. The defendant says that it was an accident. That may be true, and in the absence of any other testimony a jury would be justified in so finding. But, on the other hand, the jury may infer that this is not a satisfactory explanation; that the difference between the width of the belt fork and the belt in some way

caused the machine to start; that the piece of wood put upon it to make it correspond had worn or dropped out, and that caused the movement of the belt on the pulley. We do not suggest that either of these hypotheses is true. We are not sufficiently advised to have any opinion in regard to it. We merely say that a properly adjusted belt, removed from the tight pulley on to a loose pulley, does not usually get back on to the tight pulley and start the machine at so rapid movement as to tear a man's arm off. It is for this reason the law says that the plaintiff is entitled to have a jury pass upon the physical facts and condition and to say whether in their opinion he has made good his allegation of actionable negligence. The defendant may, or may not, introduce evidence as it is advised. By failing to do so, it admits nothing, but simply takes the risk of *non persuasion.* This is what is meant by going forward with testimony. He, by this course, says that he is willing to go to the jury upon the plantiff's evidence.

While the rule has not been, in express terms, often applied in this State, it is by no means new or of unusual application. Prof. Wigmore says that, for a generation at least, in England it has been conceded to exist "for some classes of cases at least." In 1865 *Erle, C. J.,* in *Scott v. London Dock Co.,* 3 H. & C. (Com. L. R. U. S., 134,) said: "There must be some evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants and the accident is such that, as in the ordinary course of things, does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." The limitations governing the application of the rule are thus stated by Wigmore. (Sec. 2509).

"(1) The apparatus must be such that, in the ordinary instance, no injurious operation is to be expected, unless from

a careless construction, inspection or user. (2) Both inspection and user must have been at the time of the injury, in the control of the party charged. (3) The injurious occurrence or condition must have happened irrespective of any voluntary action, at the time, by the party injured." The underlying reason for the rule is that usually the chief evidence of the true cause of procedure is practically accessible to the defendant, but inaccessible to the person injured. *Stewart's case, supra.* It is for this reason that in some cases the Legislature has made the fact of injury "*presumptive* evidence" and in others a "*prima facie*" case. *Aycock's case, supra.* The learned counsel for defendant insisted that the plaintiff cannot recover because there is no evidence that, if defective, the defendant had notice or could by reasonable care have known of such defect. It is well settled that this is essential to the plaintiff's recovery. The question is not, in the present condition of the record, presented. We cannot tell in what respect, if at all, the jury would find the shifter or other part of the machine defective. Their attention would be directed to this element in the plaintiff's case, either by a specific issue or by instruction. *Hudson v. R. R.,* 104 N. C., 491. Other questions will probably arise upon the trial. If the belt was thrown upon the tight pulley by an accidental contact with the plaintiff or some other person, or if it was the result of the negligence of a fellow servant, the court would instruct the jury in respect to the law. The question of the plaintiff's own conduct and its effect upon his right to recover, are to be presented by proper instructions. Our ruling is confined to the one question, whether the case should have gone to the jury upon the physical conditions disclosed by the evidence. It does not appear what the plaintiff proposed to show by the rejected questions; hence we cannot pass upon the exceptions to His Honor's rulings.

The judgment of nonsuit must be set aside and a new trial had.

New Trial.

HUTCHINSON v. RAILROAD.

(Filed November 28, 1905).

Railroads—Failure to Stop at Station—Right of Passenger—Reasonable Regulations—Damages Recoverable.

1. The issue, "Did the defendant maliciously or wilfully, wantonly and rudely mistreat and humiliate the plaintiff while a passenger on its train?" is a pure issue of fact, and the finding of the jury is conclusive, the judge having refused to set the verdict aside.

2. It is a reasonable regulation of the defendant that certain trains shall not stop at all stations, provided there are enough to serve the purposes of local travel.

3. It is the duty of the defendant to have an agent at the gate to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into the train, without objection, with a ticket calling for a regular station, as her destination, and nothing on its face to show it was not good on that train, and she not knowing that that train did not stop there, it was the duty of the defendant to stop the train at that point for her.

4. On the question of damages, the court correctly instructed the jury that if the conductor maliciously or with wanton recklessness carried the plaintiff by her station, or if he maliciously or wantonly mistreated and humiliated her, they could assess punitive damages.

5. Under section 1963 of The Code, when a passenger is carried by his station, he is entitled to damages, and this, though there is no bodily harm, or actual damages. If it is done recklessly or wilfully, he is entitled to punitive damages. *Smith v. Railroad*, 130 N. C., 304, overruled.

ACTION by Mattie Hutchinson against Southern Railway Company, heard by *Judge W. B. Councill* and a jury, at the May Term, 1905, of the Superior Court of CATAWBA. From a verdict and judgment thereon, the defendant appealed.

Self & Whitener and *Hufham & Williams* for the plaintiff.

S. J. Ervin for the defendant.

CLARK, C. J. The *feme* plaintiff, a widow, bought a ticket from Hickory, North Carolina, to Liberty, South Carolina. The agent at Hickory told her she would make connection with the 1 p. m. train at Charlotte. On arriving at Charlotte, where she had to change cars, her train missed connection and she took the next train which left there at 10:20 p. m. This was a train which did not stop at all stations, Liberty being one of those at which, by the defendant's printed schedule, it did not stop, but the plaintiff testified that she was not aware of that fact and no one so informed her; on the contrary, the conductor on the train, before getting to Charlotte, told her she would miss connection, but said this 10:20 train from Charlotte would take her to Liberty that night; that in the 18 months previous she had twice traveled on that same 10:20 train and each time had been put off at Liberty; that soon after leaving Charlotte, the conductor on taking up her ticket exclaimed in a loud, imperative and commanding tone, "What are you doing in here? You have no business in here. Who told you to get on here?" that he kept repeating this, rebuking her, and she was deeply humiliated. She says she asked him to give her back her ticket and put her off at the first station (Gastonia); that if he had done this she would have spent the night there, and have gone on in the day time next morning to Liberty, but instead of this he kept the ticket and later came back again, rebuking her in a loud voice, heard distinctly all over the coach, telling her she had no business in there and saying, "I want to know who told you to get on"—adding that she knew the train did not stop at Liberty; that he spoke in a very ill-natured tone and loud voice; that she tried to reason with him and again asked him to put her off at the first stop; that he came back

the third time with the same loud, boisterous charges; that when she did not reply, being very nervous and humiliated, he "looked at her very furiously and said, 'What if he didn't put me off there.'" To this she says she replied finally that she had paid her fare and did not deserve such indignities and that he would hear from her; that at Gastonia he did not return her ticket as requested, so she could not stop; that he did not stop at Liberty, where her people were on the platform as she passed, she having telegraphed her daughter from Charlotte that having missed connection she would be on that train, but she was carried past to Seneca, about 25 miles further on, where she was put out at 2:30 at night, and had to sit on the platform alone till 4:30, when she took the train back, reaching Liberty before daylight in a shattered nervous condition, and walked in the dark up to her son-in-law's house alone, a half mile away, and was so exhausted by the nervous strain and exposure to the night air, that she was ill, called in a physician and was confined to her bed several days.

The conductor in his testimony denied any discourtesy or rudeness, but says that he was polite and carried her on to Seneca because he suggested to her that she would get to Liberty six hours earlier by taking the northbound train back than if she stopped at a station this side and waited for a southbound train to Liberty, and that she consented to this.

In this conflict of evidence the jury found upon the issues submitted to them:

1. Did the defendant wrongfully refuse to stop its train at Liberty and permit the plaintiff to depart therefrom? Yes.

2. Did the defendant maliciously or wilfully, wantonly and rudely mistreat and humiliate the plaintiff while a passenger on its train? Yes.

The latter was a pure issue of fact and the finding of the jury is conclusive, the judge having refused to set the verdict aside. As to the first issue, it is a reasonable regulation of

the defendant that certain trains shall not stop at all stations, provided there are enough to serve the purposes of local travel, and it does not appear that there was not. If the plaintiff had been aware that this train did not stop at Liberty, she could not complain if she had been put off at Gastonia, the first stop, with her ticket endorsed with leave to pursue her journey by the next train stopping at Liberty. But she testifies that she had no such information, on the contrary, that she had twice in 18 months previously been on the same train which stopped and put her off at Liberty. The notice on the printed schedule of the company was not brought home to her and there was no evidence that she had any actual notice. There was nothing on the face of her ticket to show that it was not good on that train. It was the duty of the defendant to have had an agent at the gate (as is usual) to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into this train, without objection, with a ticket calling for Liberty, a regular station, as her destination, and she not knowing that this train did not stop there, it was the duty of the defendant to stop the train at that point for her. On the question of damages His Honor correctly instructed the jury that if the conductor maliciously or with wanton recklessness carried her by her station, or if he maliciously or wantonly mistreated and humiliated her, the jury could assess punitive damages.

The authorities are plenary that the passenger is entitled to recover punitive damages for insult or mistreatment on the part of any employee of the common carrier. *Williams v. Gill,* 122 N. C., 970; *Strother v. Railroad,* 123 N. C., 197, and many other cases.

It is equally true that The Code, section 1963, provides that passengers shall be put off at the destination to which they have paid, and that the carrier "shall be liable to the

party aggrieved in an action for damages for any neglect or refusal in the premises;" and that when the refusal to take on or discharge a passenger, where he is entitled to be received or discharged, is reckless and wanton, punitive damages may be recovered. *Purcell v. Railroad,* 108 N. C., 417; *Hansley v. Railroad,* 117 N. C., 570; *Coleman v. Railroad,* 138 N. C., 355. Certainly the plaintiff, an unprotected female, was entitled to recover if recklessly and wilfully carried against her protest 25 miles beyond her station, was put out at 2:30 at night at a strange station, where she sat at dead of night two hours alone on the platform, and at last reached her destination before day to be met by no one, and had to walk to her daughter's house alone and with shattered nerves had to take her bed and call in a physician. *Holmes v. Railroad,* 94 N. C., 323; *Knowles v. Railroad,* 102 N. C., 66.

The authorities are uniform, here and elsewhere, that if the passenger is carried by his station he is entitled to damages, and if it is done recklessly or wilfully, as the jury here find, he is entitled to punitive damages. The only decision we can find in the books to the contrary is *Smith v. Railroad,* 130 N. C., 304, which holds that if there is no bodily harm or actual damages a recovery cannot be had. That decision was by a divided court and is in conflict with the statute (Code, section 1963,) above quoted, and unsupported by precedent, and we take this first opportunity to correct and overrule it.

In Thompson on Carriers, 66, it is said: "Carrying a passenger beyond his destination, in disregard of his request, to be put off there, will afford a good ground of action, and this, though no bodily harm, mental suffering, insult or oppression or pecuniary loss be shown"—citing *Railroad v. Hurst,* 36 Miss., 660; *Porter v. The New England,* 17 Mo., 290; *Railroad v. Nuzum,* 50 Ind., 141; *Railroad v. McArthur,* 43 Miss., 180; *Railroad v. Whitfield,* 44 Miss., 466; *Sunday v. Gordon,* 1 Blatch. & Ad., 569; *Thompson v. Rail-*

road, 50 Miss., 315. To the same purport, 1 Fetter Carriers of Passengers, sec. 300—citing *Caldwell v. Railroad,* 89 Ga., 550; *Dave v. Steamboat Co.,* 47 La. Ann., 576; *Strange v. Railroad,* 61 Mo. App., 586, and there are many other cases to the same effect.

Upon examination of all the exceptions and without discussing them *seriatim,* we find

No Error.

MANUFACTURING CO. v. CLOER.

(Filed November 28, 1905).

Ejectment—Trespass—Equitable Defense—Duty to Tender Issue—Evidence.

1. In an action to recover lands and for damages for a trespass thereon, where the defendant denied the allegations of the complaint and alleged mutual mistake as a foundation for correcting the deed, but no issue was submitted by the court or tendered by the defendant upon this equitable defense, it was error to admit evidence of the alleged mistake.

2. If the defendant relied upon the equitable matter set out in the answer, it was his duty to tender appropriate issues upon which the facts set out could be found.

3. Where the defendant in his answer sets up a mistake in a deed under which he claims, but does not pray for a reformation thereof, yet the court may award such relief, if the allegations of the answer and the findings of the jury upon appropriate issues justify it.

ACTION by Gwyn-Harper Manufacturing Company against E. F. Cloer and another, heard by *Judge James L. Webb* and a jury, at the February Term, 1905, of the Superior Court of CALDWELL.

This is an action to recover certain lands and for damages for a trespass thereon. These issues were submitted: (1) Is

the plaintiff the owner of the lands described in the complaint or any part thereof? A. Yes; south of dotted lines from four to seven. (2) Have the defendants, or either of them, trespassed upon the land described in the complaint? A. No. (3) What damage, if any, has plaintiff sustained? A. (*No.*) Nothing.

From the judgment rendered, plaintiff appealed.

Edmund Jones for the plaintiff.

No counsel for the defendants.

BROWN, J. The plaintiff alleges in the complaint that it is the owner and entitled to the possession of the land described therein and that the defendants unlawfully entered and trespassed thereon. The defendants deny those allegations and in their answer also make the following allegation as a foundation for correcting and reforming the deed, VIZ.:

"4. The defendants admit that in the year ....the defendant, E. F. Cloer, executed a deed to one Monroe Minish for the land described in the first paragraph of the complaint, but they aver that the last call in the description was erroneous; that said call, instead of being thence 'north to Cloer's back line' should have been 'west to Cloer's back line;' that the error was due to the mistake and oversight of the draftsman, J. C. Harper, now deceased, and was made by mutual mistake and oversight of the grantor, the said E. F. Cloer, and the grantee, Monroe Minish, or by the mistake of E. F. Cloer and the fraud of Monroe Minish. Having answered the complaint fully the defendants ask that they go hence without day and recover their costs."

The defendants do not pray for a reformation of the deed as they should have done, but the court would award it if the allegations of the answer and the findings of a jury upon appropriate issues justified it.

Upon the trial, the defendants introduced E. F. Cloer, who

claims to be the owner of the land in dispute, and proposed to prove by him that at the time of the sale of the land by him to Minish in March, 1881, a mistake was made in the calls of the deed; that instead of *north* to Cloer's back line as shown in the deed, the call should have been *west* to Cloer's back line, and running west as contended for by defendants, the land in dispute would have been left out of the boundary conveyed to Minish. The plaintiff excepted to the introduction of this evidence. We think the exception well taken.

The form of the issues did not justify the reception of such evidence. There was no exception to the issues by either party and no other issues were tendered by the defendants.

If the defendants relied upon the equitable matter set out in the answer, it was their duty to tender appropriate issues upon which the facts set out in their fourth allegation could be found. If the plaintiff desires to meet such new matter by denying it, and also by averring that he is an innocent purchaser for value without notice, and that the defendants are guilty of laches in correcting his deed, he should file a proper replication to the answer, and upon the trial should tender appropriate issues.

Upon the form of the issues, we hold His Honor erred in admitting the evidence.

New Trial.

HAYES v. RAILROAD.

(Filed November 28, 1905).

Railroads—Negligence—Withdrawal of Portion of Evidence —Practice—Nonsuit.

1. The plaintiff alleged that his injuries were caused by the negligence of the defendant and specified different acts or omissions as constituting the negligence. When the court, at the close of the testimony, intimated that it would withdraw a portion of the plaintiff's evidence from the jury, it acted prematurely and the ruling at that time was calculated to embarrass and to handicap the plaintiff in the development of his case and necessarily to prejudice him, and the case will be remanded with direction to set aside the nonsuit taken in deference to the court's intimation.

2. Plaintiff may submit to an involuntary nonsuit, which he is driven or compelled to take, reserving leave to move afterwards to set the same aside, with a view not to abandon the prosecution of the suit, but to further prosecute it by appeal, in order to test the correctness of a ruling of the court which may otherwise be fatal to his case.

ACTION by Samuel Hayes against the Atlanta & Charlotte Air Line Railway Company, heard by *Judge O. H. Allen* and a jury, at the January Term, 1905, of the Superior Court of MECKLENBURG.

Plaintiff brought this action to recover damages for personal injuries alleged to have been caused by the negligence of defendant. He was a switchman in defendant's employ and belonged to the crew in charge of the "switch local" between Gastonia and Gaffney, which places were about 30 miles apart. Plaintiff complains that defendant used a road or line engine when it should have had a switch engine for that kind of work, and that the road engine was in itself unfit for such service, and lastly that it was out of order, in that it had a defective flange on the lower rim of the pilot which was used by switchmen as a step to get on and off the

engine when in motion and while they were engaged in switching; that plaintiff, while in the performance of his duties, stepped upon this flange, as it was his custom to do, and it gave way, causing him to be knocked down by the pilot and dragged some distance, when the wheel of the engine ran over his leg and crushed it. Plaintiff further alleged that he rode on the pilot with the knowledge and consent of defendant's employees, under whose orders, as his superiors, he worked.

Defendant denies these allegations and avers that plaintiff was not entitled to have a switch engine for such work as he was doing, and that it was not required in such service and could not safely be used, as the train moved from place to place along a considerable stretch of the main track of its railway, and the switching was therefore not done in a regular switch yard where such engines are commonly used; that a road engine was proper and sufficient for the purpose, and that the engine in question was in good condition and supplied with a step and a staff behind the pilot, as good as a foot board and hand hold, where plaintiff could get on and off the engine and where he could stand and hold on with perfect safety. Defendant specially denies that the flange was not in good condition and avers that it was safe and sound and that plaintiff's injuries were caused by his own negligence. Plaintiff denied that there was any step behind the pilot.

Testimony was introduced by each of the parties to sustain their respective contentions. At the close of the testimony, the court intimated that it would charge the jury that there was not sufficient evidence as to the negligence of defendant in failing to use a switch engine, and that it would submit only the evidence as to defendant's negligence in respect to the condition of the flange, the contributory negligence of plaintiff and the proximate cause of the injury as between

these two alleged acts of negligence. In deference to this intimation, plaintiff submitted to a nonsuit and appealed.

Pharr & Bell and *A. G. Mangum* for the plaintiff.
W. B. Rodman for the defendant.

WALKER, J., after stating the case: We will not discuss the question raised in the argument before us, whether it was the duty of defendant to have had a switch engine instead of a road engine for the use of the crew on its train, as it is not necessary to a decision of the case.

Plaintiff alleges that his injuries were caused by the negligence of defendant and specified different acts or omissions as constituting the negligence. Each act or omission, so alleged, was not pleaded nor intended to be treated as the basis of a separate and distinct cause of action, but as singly, or in connection with the others, tending to establish the one cause of action for the negligence which resulted in his injury. When the court intimated that it would withdraw a portion of plaintiff's evidence from the jury, it acted prematurely, for the case was not being submitted to the jury at the time and the ruling did not extend to the entire cause of action, as would be the case with a judgment sustaining a motion to nonsuit or to dismiss. The ruling at that time was calculated to embarrass and to handicap plaintiff in the development of his case and necessarily to prejudice him. But we will not further discuss this matter, nor will we even refer to the legal merits of the case, so far as presented by the pleadings and evidence, when it was abruptly brought to a close by the intimation of the court. Nor is it necessary to decide, as will hereafter appear, whether plaintiff proceeded properly when he elected to be nonsuited, and appealed. It is common practice for a plaintiff to submit to an involuntary nonsuit, which he is driven or compelled to take, reserving leave to move afterwards to set the same aside, with a view

not to abandon the prosecution of the suit, but to further prosecute it by appeal, in order to test the correctness of a ruling of the court which may otherwise be fatal to his case; and the practice is a useful one when restricted within its proper limits. *Mobley v. Watts,* 98 N. C., 284; *Hickory v. Railroad,* 138 N. C., 311; *Hedrick v. Pratt,* 94 N. C., 101. In order to avoid appeals based upon trivial interlocutory decisions, the right thus to proceed has been said to apply ordinarily only to cases where the ruling of the court strikes at the root of the case and precludes a recovery by plaintiff. Plaintiff's right to take the course he did was challenged in this court, because the ruling did not cover the whole case, but left him ground upon which a recovery could be had. But we do not find it necessary to resort to said rule of practice in order to dispose of this appeal, and we do not therefore decide that it warranted or did not warrant the action of plaintiff. In *Davis v. Ely,* 100 N. C., 283, plaintiff sought by the allegations of his complaint to have a contract corrected in certain respects. After the jury were empanneled and the pleadings read, the court intimated that he was not entitled to the equity of correction, but to that of rescission. He excepted, submitted to a nonsuit and appealed. It was held that the nonsuit was unnecessary at that stage of the trial, and the appeal therefore could not be entertained. But notwithstanding this decision, the court, referring to the ground upon which it had based the ruling and in disposing of the case, said: "For these reasons we should dismiss the appeal and allow the cause to proceed in the court below, but that such would not be the result in this case because of the nonsuit which ends the action, and this action was in deference to the intimated ruling. We therefore remand the cause that the nonsuit may be set aside and the action proceed."

Pursuing the course taken in that case, we remand the

cause with directions to set aside the nonsuit and thereafter to proceed in the same according to the law and the course and practice of the court.

New Trial.

OYSTER v. MINING CO.

(Filed November 28, 1905).

Pleadings—Misjoinder of Parties and Causes of Action—Parties.

1. Where a complaint charges that the defendant, with the consent of a corporation, his co-defendant, converted the corporation and all of its assets to his own use and used and manipulated the corporation and its property for his own benefit and managed it recklessly and disposed of its property to defraud the stockholders, and one general object of the complaint is to recover property belonging to the plaintiff which the two defendants confederated to destroy, *held*, that a demurrer for misjoinder of parties and causes of action was properly overruled, it appearing that the two defendants are so intimately connected with the transactions that it would be almost impossible to investigate any of the grounds of complaint, unless both are made parties.

2. Where a general right is claimed, arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter in one suit.

ACTION by Chas. C. Oyster against the Iola Mining Company and M. L. Jones, pending in the Superior Court of MONTGOMERY, and heard by consent at Dallas, by *Judge C. M. Cooke*, upon a demurrer. From a judgment overruling the demurrer, the defendants appealed.

H. C. Niles, Adams, Jerome & Armfield and *W. J. Adams* for the plaintiff.

C. W. Tillett, Osborn, Maxwell & Keerans and *E. E. Raper* for the defendants.

CLARK, C. J. This is an appeal from a judgment overruling a demurrer to the complaint. Briefly stated, the grounds of demurrer are: (1) Misjoinder of parties. (2) Misjoinder of causes of action. (3) Failure to state a cause of action against Iola Mining Co. (4) Failure to state a cause of action against M. L. Jones. These are the only defendants.

Without fully analyzing the complaint, it charges that the defendant Jones, with the consent of the defendant Mining Company and its manager, has wrongfully converted the entire corporation and all its assets to his own use, and has manipulated and used the corporation and its property for his own benefit exclusively; that as manager and with the consent of the corporation he has taken exclusive possession of the entire property of the corporation; that his management has been reckless and improvident; that he has disposed of the products of the mine for the deliberate purpose of defrauding the stockholders of the mining company, including the plaintiff, and preventing an enforcement of their rights.

One general object of the complaint is to recover property belonging to the plaintiff, which it is alleged that the two defendants confederated to destroy or place beyond the reach of the plaintiff. The 32,000 shares of stock mentioned in the first cause of action are alleged to have been wrongfully disposed of by the two defendants, and the proceeds divided between them. The 75,000 shares named in the second cause of action, it is alleged, were fraudulently declared forfeited, and were sold by both defendants and the proceeds applied in part to a debt of the corporation already paid. The fourth cause of action alleges that Jones concurred in this disposition of the property to defeat the second cause of action,

while the third clause, claiming $5,800 against the corporation is connected with the second by reason of the fact that $3,000 of the $5,800 went to the said corporation by reason of the fraudulent conversion of the stock mentioned in the second cause of action, and the allegation that Jones, with the consent of said company, has secreted and disposed of the property of the corporation to defeat the collection of the debt due the plaintiff. The complaint also asks for a receiver and injunction to protect the plaintiff's interest in the property and to secure the payment of such judgment as he may recover.

The two defendants are so intimately connected in these series of transactions that it would be almost impossible to investigate any of the grounds of complaint, and unravel the tangled skein, unless both defendants are made parties and have opportunity to be heard, and the whole series of transactions is gone into. Under the former system of procedure at common law, where everything was calculated for the production of a single issue, it was essential to exclude all parties and causes of action save one, if possible. The present procedure more nearly resembles the former equity practice. "Where a general right is claimed, arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter in one suit." *Young v. Young,* 81 N. C., 92. This has been recently followed in *Fisher v. Trust Co.,* 138 N. C., 224, in which *Benton v. Collins,* 118 N. C., 196, and many other cases of similar purport are collected. Upon the allegations in the complaint, both defendants being called on to answer and having opportunity to defend, the whole matter can be inquired into and the rights of all the parties properly adjusted better and more readily than if the action were chopped up into many distinct and several actions.

No Error.

WALKER, J., concurring in result: The complaint is so drawn that it is difficult to determine with certainty whether or not there has really been a misjoinder, and while this question is to be decided in the first instance at least by the complaint itself, it may sometimes turn out that there has in fact been a misjoinder when it does not appear on the face of the pleading. In order to sustain the joinder of the causes of action in this case, it is necessary to give the allegations a very liberal construction under section 260 of The Code. If the object is to recover a debt due by the corporation for money borrowed from Mosser & Co., and to recover damages from Jones and the company for a wrongful conversion of the stock of Mosser & Co., and finally to charge them with mismanagement of the affairs of the company, and a tortious manipulation of its assets, for the purpose of defeating the recovery of the debt and of the damages for the conversion of the stock, the causes of action can be joined. *Benton v. Collins,* 118 N. C., 196. The objection to the pleading is that the plaintiff does not clearly and distinctly allege a joint liability of the company with Jones, though it was doubtless the intention of the pleader so to do. The confederacy between the two to defeat the plaintiff's rights is not set forth with that certainty and definiteness which The Code requires, but this defect should perhaps have been taken advantage of by motion and not by demurrer. Code, section 261. Again it appears, by implication at least, that the members of the firm of Mosser & Co. consented to the alleged wrongful acts of Jones, because it is alleged that the company consented, and they were stockholders, directors and the principal officers of the company, and there is no allegation that they protested against what was contemplated to be done and was afterwards actually done by Jones. Whether Mosser & Co., plaintiff's assignors, gave their consent to the alleged wrongful acts in such a way as to deprive them of any right now to complain of them, is a question I prefer to

decide when the facts are all before us, and not now upon the present meager statements of the complaint. There is ambiguity in the allegations of the complaint, but under the circumstances I do not feel justified in withholding my assent to the conclusion of the court, believing it better than the matter should be investigated when the facts will be shown with more clearness, and not seeing, at present, that any substantial right of the defendants is likely to be prejudiced thereby. The defendants, as has been said, could have had the allegations of the complaint made more definite and certain, in order "that the precise nature of the charge would be made apparent." Code, section 261. This was not done for some good reason, I have no doubt, and, in the absence of a more definite statement, construing the complaint liberally, as required by section 260, I concur in the decision for the reasons already assigned, though my assent is not unreservedly given to all that is said in the opinion of the court. Care should be taken that we do not give too loose an interpretation to section 260 of The Code with respect to misjoinders, and too free a hand to pleaders in such cases. That section was enacted to prevent multifariousness and confusion in the trial of causes, which should always be avoided in pleading, and parties, who may otherwise be prejudiced, are entitled to its strict enforcement. "The bill," says *Judge Story,* "should not be multifarious, for if it is so it is demurrable, and may be dismissed by the court of its own accord, even if not objected to by the defendant. By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. In the latter case the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the

statement of the several claims of the other defendants with which he has no connection. In the former case, the defendant would be compellable to unite, in his answer and defense, different matters wholly unconnected with each other, and thus the proofs applicable to each would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. Indeed courts of equity, in cases of this sort, are anxious to preserve some analogy to the comparative simplicity of proceedings at the common law, and thus to prevent confusion in their own pleadings as well as in their own decrees." Story Eq. Pl., sec. 271. The principle thus stated applies to misjoinders under The Code, except as to the method of raising the objection.

CONNOR, J., concurs in the concurring opinion.

ELLER v. RAILROAD.

(Filed November 28, 1905).

Carriers — Delay in Delivery of Baggage — Trousseau —Mental Anguish—Former Judgment—Estoppel—Damages.

1. The general rule in the law of damages is that all damage resulting from a single wrong or cause of action must be recovered in one suit.

2. In an action for damages for mental anguish alleged to have been suffered by the plaintiff, by the negligent delay in delivering her valise containing her trousseau, whereby her wedding had to be postponed, where it appeared that she had already sued the defendant in an action for non-delivery of her valise and damage to the property, and that the suit was settled, she is precluded by the former settlement, from claiming any damage for mental anguish in this action, if any such right she ever had.

ELLER *v.* RAILROAD.

3. Where the defendant did not know of the intended marriage, the male plaintiff has no cause of action for the defendant's negligence in the delivery of the *feme* plaintiff's baggage, containing her trousseau. In this case the damage claimed was not in the contemplation of the parties and too remote.

ACTION by Dora Eller and Albert Eller, her husband, against the Carolina & Northwestern Railway Company, heard by *Judge W. B. Councill* and a jury, at the May Term, 1905, of the Superior Court of CATAWBA.

On September 5, 1904, the *feme* plaintiff, then Dora Anderson, was a passenger on defendant's train from Granite Falls to Hickory. She had, as baggage, a valise of the kind usually known as a "telescope," containing clothing, letters, photographs and other articles, which was checked to Hickory and should have arrived at its destination on the 5th of said month, but did not arrive until the evening of the 7th. The *feme* plaintiff was going to Hickory for the purpose of being married to her co-plaintiff, Albert Eller, to whom she was at the time engaged. The wedding had been set for the morning of the 6th, but in consequence of the delay in receiving her baggage it had to be postponed until the 7th, as her wedding trousseau was in the valise. When her baggage was tendered to her she refused to take it, as the valise was torn and her clothes were wet and muddy and so badly damaged that they could not be used. She alleges that by reason of the premises she suffered great mortification and mental anguish and seeks to recover damages on that account. It appears that she had already sued the defendant in an action for the non-delivery of her valise and the damage to the property. That suit was settled and she received from defendant $30 and the clothes were returned to her. At the close of the testimony the court, on motion of defendant, dismissed the action. Plaintiff excepted and appealed.

Self & Whitener for the plaintiff.

J. H. Marion, T. M. Hufham and *Witherspoon & Witherspoon* for the defendant.

WALKER, J., after stating the case: The general rule in the law of damages is that all damage resulting from a single wrong or cause of action must be recovered in one suit. The demand cannot be split and several actions maintained for the separate items of damage. Plaintiff recovers one compensation for all loss and damage, past and prospective, which were the certain and proximate results of the single wrong or breach of duty. Pierce on Railroads (1881), 300, 301, and note 1. The rule is different where there is a continuing wrong or the wrong is repeated, as in the case of a nuisance or trespass, or where there is a new trespass distinct from the original one. Hale on Damages, 77, 78. Generally speaking, the redress the law affords for the commission of a wrong is pecuniary compensation. A plaintiff may recover what we call nominal damages, which are really no pecuniary compensation, but which merely ascertain or fix his right or cause of action. *Lord Holt* has well said: "Surely every injury imports a damage, though it does not cost the party one farthing, and it is not impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal injury." *Ashby v. White*, 2 Ld. Raymond, 938 (Smith's L. C., 425). The idea here is, as we see, that there is damage in the contemplation of law, though the injury involves neither loss nor pain, because the man's right to be protected in his person and reputation has been violated. Cooley on Torts (2 Ed.), 69. "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against the party for some amount." *Denman, C. J.*, in *Clifton v. Hooper*, 6 Q. B., 468. It was held in *Fray v. Goules*,

1 El. & El. (102 E. C. L.), 839, that an attorney is liable for compromising his client's suit, contrary to instructions, even though it turned out that he acted with reasonable prudence and *bona fide*, and for the actual benefit of his client, there being no loss whatever, much less an appreciable one. It is only when the gist of the action is damage that the maxim *de minimis non curat lex* applies, and that the law no longer distinguishes between no appreciable damage and no damage at all. *Hale, supra*, 27, 28.

In *Bond v. Hilton*, 47 N. C., 149, the court, in a full discussion of this question, says: "Wherever there is a breach of an agreement, or the invasion of a right, the law infers some damage, and if no evidence is given of any particular amount of loss, it gives nominal damages by way of declaring the right, upon the maxim *Ubi jus, ibi remedium.*" And again, "In every contract implying a duty to be performed, the neglect of that duty gives, in law, a cause of action to the opposite party, under the above maxim, and when the law gives an action it gives damages for the violated right, and if no actual damages be shown, the plaintiff is entitled to nominal damages."

Where there is an invasion of another's right, the cause of action is the wrong, or what we technically call "the injury," which entitles him at least to nominal recompense to vindicate his right, and the consequences which immediately flow from that injury, in the way of loss or damage, are but matters of aggravation. *Hale. supra*, 77. In *Fetter v. Beal*, 1 Salk., 11, plaintiff recovered damage for an assault and battery by which his skull was broken and afterwards, upon the falling out of a piece of his skull, he brought an action for additional damage. The former recovery was held to be a bar to the latter action. *Holt, C. J.*, said: "As to the case of a nuisance by water dropping from the eaves of the house, every new dropping is a nuisance, but here is not a new battery, and in trespass the grievousness or consequence of the

battery is not the ground of the action, but is only the measure of damages which the jury must be supposed to have considered at the former trial." In the same case, as reported in 1 Lord Raym., 692 (and it appears to have been considered as a very important one and controlling as an authority), *Lord Holt* further says: "This is a new case to which there is no parallel in the books. Every one shall recover damages in proportion to his prejudice which he hath sustained; and if this matter had been given in evidence, as that which in probability might have been the consequence of the battery, plaintiff would have recovered damages for it. The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in aggravation of damages. In some cases the damage is the foundation of the action, as in the action by the master for battery of his servant, *per quod servitium amisit,* but, here, the battery only is the foundation of the action, and this damage, which might probably ensue, might and ought to have been given in evidence, and must be intended to have been given in evidence in the former action, and that the jury gave damages for all the hurt that he suffered; for if the nature of the battery was such as probably to produce this effect, the jury might give damages for it before it happened." Sedgwick thus states the rule: "It thus appears that fresh damages merely will not always give a fresh action, and a judgment in a suit founded on a single act of tort will be a conclusive bar to a second suit for the same injury, although harmful consequences have made themselves apparent subsequent to the first suit; as it will be held that in the first verdict the plaintiff recovered all he was entitled to claim. Hence the statute of limitations runs from the time of the breach." 1 Sedg. on Damages (8 Ed.), sec. 84. He also states well the distinction between mere items of damage for a single tort and the repetition of the trespass or tort itself. "In the case of a personal injury," says he, "the act complained of is com-

plete and ended before the date of the writ. It is the damage only which continues and is recoverable, because it is traced back to the act; while in the case of a nuisance, it is the act which continues, or, rather, is renewed day by day. The duty which rests upon the wrongdoer to remove a nuisance causes a new trespass for each day's neglect." 1 Sedg., *supra,* sec. 88. The question is fully discussed and the distinctions clearly drawn, by *Battle, J.,* in the leading case of *Moore v. Love,* 48 N. C., 215. See also *Hatchell v. Kimbrough,* 49 N. C., 163.

We do not decide that mental anguish is an element of damage in a case of this kind, but if, for the sake of argument, we concede that it is, the *feme* plaintiff could have had such damages as she was entitled to recover on that account included in her former judgment or settlement. Having elected not to do so, she is precluded now from claiming any such damages. Her right to them, if right she ever had, is merged in the former recovery. She could carve out as large a slice as the law allowed, but she could not cut but once. No one should be twice vexed for the same cause, is a maxim of the law we are not disposed to disregard and which it is well strictly to enforce.

Plaintiff, Albert Eller, also asked for damages for mental anguish caused by defendant's negligence, and it is alleged in the complaint that the two plaintiffs "seek to recover one sum in satisfaction of their several claims for the causes herein set out." If plaintiffs had any valid causes of action against defendant, they could not thus join them. Code, sec. 267. There was no formal objection taken to the misjoinder, but we notice it so that attention may be called to this important provision of the law which is mandatory, and intended to protect a substantial right of defendant, and not merely directory. Plaintiff, Albert Eller, has not stated any cause of action entitling him to recover damages. Those that he claims are, in any view of the case, entirely too remote. De-

fendant did not know of the intended marriage and therefore could not have contemplated any damage to him, even if he would otherwise be entitled to recover. *Cranford v. Tel. Co.*, 138 N. C., 162. The case cited settles the law against his contention.

No Error.

REID v. RAILROAD.

(Filed November 28, 1905).

Railroads — Crossings — Negligence — Contributory Negligence—Trespassers—Instructions.

1. In an action for wrongfully causing the death of plaintiff's intestate at a crossing, an instruction that where an engine was backing on a crossing in the night time, it was the duty of the engineer to sound adequate warning and to keep a man with a light at the front of the engine as it was moving, so as to keep a lookout adequate for safety; and if there was failure in this respect and an injury resulted, there would be a negligent breach of duty, is correct, and the fact that the crossing may be also used as a part of the railroad yard or that the street ran down the track for some distance, does not change the principle.

2. An instruction "If the jury shall find that the plaintiff was walking on the railroad track and that the defendant was backing its engine along the track in the night time in the direction of the plaintiff, and that there was no light at the time on the back part of the engine and no agent there to keep a lookout along the track, or being there, failed to exercise reasonable care in looking ahead along the track for any person on or near the track, or that no bell was ringing; and if the jury shall find that the engine so moving ran against or upon the intestate and killed her; and if the jury should further find that if the bell had been ringing and there had been a proper light on the engine, the intestate would have had notice of the approaching train in time and would have escaped the danger; or that if there had been a person stationed on the engine and was exercising reasonable care in keeping a lookout along the track, he would have discovered the intestate in time to have avoided striking her, then the jury should answer the first issue yes, and the second issue no," is not erroneous in declaring that the defense of contributory negligence did not avail the defendant under the conditions stated.

3. Where plaintiff's intestate had gone to the crossing at Third street in an effort to cross the railroad and was told by an employee of the defendant that a freight train then obstructed the crossing at that point, and that she had better try the Second street crossing, and following these instructions she essayed the latter crossing and was endeavoring to cross when an engine backed upon her and death resulted, *held*, that the intestate was no trespasser and there was no contributory negligence in the mere fact that she was then upon the road.

ACTION by James Reid, Administrator of Lula Reid, against the Atlanta & Charlotte Air Line Railway Company, heard by *Judge C. M. Cooke* and a jury, at the October Term, 1905, of the Superior Court of MECKLENBURG.

This was an action for wrongfully and negligently causing the death of plaintiff's intestate. The usual issues in such cases were submitted. There was evidence to the effect that on or about February 24, 1905, about 8 o'clock at night, the plaintiff's intestate was run over and killed by an engine of the defendant; and there was evidence tending to show that at the time of the killing the intestate was endeavoring to cross the railroad at Second street crossing, in the city of Charlotte; that there were several tracks there used by the defendant in shifting and otherwise; that the street ran down these tracks for some distance, and it was usual and customary for persons who were passing over the crossing at this point to walk part of the way down the main line of the track, and the intestate was at such point at the time she was run over and killed.

The evidence of the plaintiff tended further to show that at the time intestate was killed, the engine was backed on the crossing and ran over the intestate without warning of any kind, without any light on the front end as the train moved, and without anyone stationed so as to give warning if danger or collision was imminent.

There was evidence of the defendant that at the time of the injury the bell was rung, a light was properly placed, and a

lookout kept. Under the charge of the court there was a verdict and judgment for plaintiff, and defendant excepted and appealed.

Pharr & Bell for the plaintiff.
W. B. Rodman, for the defendant.

HOKE, J. The charge of the judge below was full and clear. The jury have accepted the plaintiff's version of the occurrence, and there is no error presented which gives the defendant any just ground of complaint.

The court in substance told the jury that where an engine was backing on a crossing in the night time, it was the duty of the engineer to sound adequate warning and to keep a man with a light at the front of the engine as it was moving, so as to keep a lookout adequate for safety; and if there was a failure in this respect, and an injury resulted, there would be a negligent breach of duty; and if these duties were performed there was no negligence on the part of the defendant, and the first issue would be answered "no."

This is the rule laid down in *Purnell's case,* 122 N. C., 832. There *Furches, J.,* delivering the opinion, said: "As we understand the matter, there must be both a man and a light at night, and a man and a flag in the day. It may be one person, but he must have a light."

The fact that the crossing may also be used as a part of the railroad yard, or that this term was used by the court under the circumstances of the present case, does not at all change the principle.

On the first issue, as to contributory negligence, the court charged the jury among other things: "3. It is the duty of persons, before going upon the track of a railroad company, to stop and look and listen for any train that may be moving; or, being upon the tracks of such company in its yards where there are several tracks used for shifting cars, to be contin-

ually alert and on the lookout for a moving train; and if a person fails in this duty and in consequence of such failure is injured by a moving train, the person would be guilty of contributory negligence. 4. The burden of the first issue is upon the plaintiff; the burden of the second issue is upon the defendant."

The court further charged the jury as follows: "5. If the jury shall find that the plaintiff was walking on the railroad track and that the defendant was backing its engine along the track in the night time in the direction of the plaintiff, and that there was no light at the time on the back part of the engine and no agent there to keep a lookout along the track, or, being there, failed to exercise reasonable care in looking ahead along the track for any person on or near the track, or that no bell was ringing; and if the jury shall find that the engine so moving ran against or upon the intestate and killed her; and if the jury should further find that if the bell had been ringing and there had been a proper light on the engine, the intestate would have had notice of the approaching train in time and would have escaped the danger; or that if there had been a person stationed on the engine and was exercising reasonable care in keeping a lookout along the track, he would have discovered the intestate in time to have avoided striking her, then the jury should answer the first issue, yes, and the second issue, no." "6. If the jury are not satisfied by the greater weight of the evidence that the intestate was killed by a moving train or engine of the defendant, they will answer the first issue no."

Objection is made to section 5 of the charge for that it practically declared that the defense of contributory negligence would not avail the defendant under the conditions stated. This part of the charge does have the effect complained of, and there is no error in the ruling. The intestate had gone to the crossing at Third street in the effort to cross the road, and was told by an employee of the defendant

that a freight train then obstructed the crossing at that point, and she had better try the Second street crossing. Following these instructions she essayed the latter crossing and was endeavoring to cross when the engine backed upon her, and her death resulted.

The intestate here was no trespasser, and there was no contributory negligence in the mere fact that she was then upon the road. She was where she had a right to be, and if she was run over and killed by the engine, under the circumstances stated in this portion of the charge, there was no contributory negligence. Upon either postulate of the specified portion of the charge, there was a negligent failure on the part of the defendant's agents or employees to avail themselves of the last chance of avoiding the injury, which would render the misconduct of the defendant the sole proximate cause of the intestate's death. The case is controlled by the decisions in *Lloyd v. Railroad,* 118 N. C., 1010; *Stanley v. Railroad,* 120 N. C., 514; *Purnell v. Railroad,* 122 N. C., 832; *McIlhaney v. Railroad, ibid.,* 995.

There is no error and the judgment must be

Affirmed.

HAMRICK v. TELEGRAPH CO.

(Filed December 5, 1905).

Telegraphs— Mental Anguish— Damages— Principal and Agent—Evidence—Res Gestae.

1. In an action against a telegraph company for damages for mental anguish where it appears that the defendant delayed for twenty-eight hours to deliver to plaintiff the following telegram: "Come home at once. Your wife is bad off," and that immediately upon its receipt he started home, having been informed of the delay, and on arrival found his wife very ill, that she continued so for eleven weeks and recovered, *held*, there was some evidence of mental anxiety.

2. It was error to permit the plaintiff to testify as to a conversation about the telegram had with the agent of the defendant at the depot ten or fifteen minutes after the plaintiff received the telegram, which was handed him by his employer.

3. What an agent says while doing acts within the scope of his agency is admissible as a part of the *res gestae*. What he says afterwards concerning his acts is hearsay and inadmissible.

ACTION by W. D. Hamrick against Western Union Telegraph Company, heard by *Judge T. A. McNeill* and a jury, at the March Term, 1905, of the Superior Court of RUTHERFORD.

This was an action to recover damages for delay in the delivery of a telegram. From a judgment for the plaintiff, the defendant appealed.

McBrayer & McBrayer and *B. A. Justice* for the plaintiff.

F. H. Busbee & Son and *W. R. Whitson* for the defendant.

BROWN, J. The evidence tends to show that the plaintiff's wife, being very ill, procured one Huntley to send the

following telegram from Forest City to the plaintiff at Old Fort, N. C., about forty miles distant, viz.: "Bill, come home at once, your wife is bad off;" and also that the defendant negligently delayed the delivery of the telegram at Old Fort for some twenty-eight hours. Immediately upon receipt of the telegram, the plaintiff started home, and on arrival found his wife very ill. She continued so for eleven weeks and recovered.

(1) It is contended by the defendant that the evidence does not disclose a state of facts from which the jury can infer mental anguish; that the plaintiff was relieved of twenty-eight hours' anxiety on account of his wife's condition by reason of the delay, and that inasmuch as he arrived home and found his wife alive, and as she recovered, he has failed to show reasonable grounds for mental anxiety arising from the delay in delivering the telegram. The argument is plausible. But it does not take into account the possibility that when the plaintiff finally received the message his mental anxiety may have become very acute and much increased for fear his wife may have died during the 28 hours of delay. The mental disturbance, vexation and increased anxiety, which the knowledge of the delay may have caused to the plaintiff's mind, will readily occur to any one. Now, if the plaintiff had not been informed of the great delay in the delivery of the telegram before he started home, the defendant's contention would be sound. We are of opinion there was some evidence of mental anxiety caused by the unreasonable delay, sufficient to be considered by the jury.

(2) During the trial, the plaintiff being examined in his own behalf, stated that ten or fifteen minutes after receiving the telegram, which was handed to him by an employee of a tanning company, for which company the plaintiff was working, the plaintiff went to the depot and had a conversation with the agent of the defendant company about this telegram, in which conversation the agent made certain state-

ments and admissions with regard to its receipt and transmission, why it had not been delivered sooner, etc. To the introduction of this testimony detailing conversations had, and admissions and statements made by the agent of the defendant company at the time stated, the defendant excepted. In the reception of this evidence there was error.

In no possible aspect of the evidence can these declarations be considered as part of the *res gestae* as was contended. It seems to be the invariable rule that the declarations of an agent, to be admissible as a part of the *res gestae,* must have been made at the place where the occurrence happened. No declaration made at a different place and at a different time has ever been treated as any part of the *res gestae. Railroad v. Stein,* 19 L. R. A., 733; *Simon v. Manning,* 99 N. C., 327; *Southerland v. Railroad,* 106 N. C., 100.

The authorities are uniform that what an agent says while doing acts within the scope of his agency is admissible as a part of the *res gestae.* What he says afterwards concerning his acts is hearsay and inadmissible. *Smith v. Railroad,* 68 N. C., 107; *McComb v. Railroad,* 70 N. C., 178; *Branch v. Railroad,* 88 N. C., 575. In the case of *Western Union Tel. Co. v. Way,* 4 Southern Rep., 844, the Supreme Court of Alabama holds that statements of an agent of a telegraph company are not competent as against the company to prove that a message was not transmitted, when not made in performance of any duty relating to its transmission. In *Darlington v. Tel. Co.,* 127 N. C., 448, it is held that conversations of an agent of a telegraph company before, or declarations by him after sending a message, are incompetent to fix the company with notice of its importance.

New Trial.

BROWN v. RAILROAD.

(Filed December 5, 1905).

Trial—Tender of Witnesses—Argument of Counsel—Right to Open and Conclude.

The tendering of witnesses by the defendant for the purpose of having their fees taxed as costs does not amount to the introduction of evidence within the meaning of the Superior Court, Rule 3, and does not take from the defendant the right to open and conclude the argument.

ACTION by J. R. Brown against the Southern Railway Company, heard by *Judge M. H. Justice* and a jury, at the July Term, 1905, of the Superior Court of McDOWELL. From a judgment for the plaintiff, the defendant appealed.

Justice & Pless for the plaintiff.
S. J. Ervin for the defendant.

BROWN, J. The plaintiff offered evidence tending to prove that his mule was killed on the defendant's track at a crossing by coming in contact with a box car which partly obstructed the crossing, and which had been negligently left there for some time in such position by the defendant's agents. There was a motion for judgment of nonsuit, and this being denied the defendant excepted. The defendant offered no evidence.

After the argument was begun, the defendant asked to tender the witnesses summoned by it to the counsel for the plaintiff. This was done in order that they might be taxed in the event the plaintiff was cast under the ruling in *Loftis v. Baxter,* 66 N. C., 340, and *Henderson v. Williams,* 120 N. C., 341. The plaintiff's counsel proceeded to examine one of these witnesses before the jury, and after examining this witness claimed the right to open and conclude the argu-

ment. The court ruled that the tender of the witnesses by the defendant's counsel amounted to introducing evidence, and that, according to the practice of the court, the plaintiff should open and conclude the argument, and the defendant excepted to this ruling.

In the rules of practice adopted by the justices of this court for the government of the Superior Courts it is provided: "In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel." Rule 3, 128 N. C. In all other cases, the right to open and conclude the argument is left to the discretion of the judge and his decision is not reviewable. Rule 6. We do not think the tendering of the witnesses for the evident purpose of having their fees taxed, as costs, amounted to the introduction of evidence within the letter or spirit of Rule 3 above quoted. The introduction of evidence includes something more than the tendering of a witness.

One of the ablest law writers, Thomas Starkie, defines evidence as follows: "That which is legally submitted to a jury to enable them to decide upon the questions in dispute or issue as pointed out by the pleadings, and as distinguished from all comment and argument, is termed evidence." Starkie on Evidence, p. 8, sec. 3. Mr. Elliott says that Starkie's definition is among the clearest and best that has ever been framed. Elliott, sec. 6.

The word "evidence" is used in Rule 3 in the sense and with the significance given to it by the text and judicial writers. Witnesses are vehicles or means of proof. Evidence is the proof itself, offered to establish or disprove an alleged fact, the truth of which is in dispute. Unless the party tendering a witness examines such witness, with a view thereby to elicit proof in support of his side of the controversy, he cannot be said to introduce evidence.

If we should adopt the construction placed upon the rule

by the court below, then defendants will in all cases have to surrender the right to have their counsel open and conclude the argument, under the terms of the rule, or else forfeit the right to have their witness fees taxed, as costs, although the plaintiff should be cast in the suit. We are quite sure such a construction or intention was not in the minds of our predecessors when the rule was formulated.

We have examined the cases of *Cureton v. Garrison,* 111 N. C., 271, and *Sitton v. Lumber Co.,* 135 N. C., 542, and neither of them decides the point presented upon this appeal. They relate to the taxation of costs only.

The object of tendering the witnesses is to give the adversary party an opportunity to test their materiality, and to prevent oppression by summoning a multitude of immaterial witnesses for the purpose of increasing costs. This disposition of the case renders it unnecessary to consider the remaining exceptions of the appellant.

New Trial.

FURR v. JOHNSON.

(Filed December 5, 1905).

Register of Deeds—Marriage Licenses—Penalties—Reasonable Inquiry—Question for Court—Instructions—Examination of Witnesses Under Oath—Burden of Proof—Evidence.

1. In an action against a register of deeds to recover the penalty under section 2090 of the Revisal, where there is a conflict of evidence, whether there has been "reasonable inquiry" is to be submitted to the jury upon all the evidence under proper instruction; but if the facts are agreed, it is a matter of law.

2. In an action against a register of deeds to recover the penalty under section 2090 of the Revisal, an instruction that if the jury found that the prospective groom told the defendant that the girl was 18, for he had seen her age in the Bible and she had told him she was 18; and should further find that defendant knew the witness Lowder well and knew him to be a man of good character, and that he stated to the defendant that the girl was 18, and that he lived just across the street from her family and signed the paper, not under oath, and that defendant honestly believed these statements and acted on them, believing them, the defendant made reasonable inquiry, is correct.

3. Section 2088 of the Revisal does not require that the register shall make inquiry by examination of the witnesses in such cases under oath, but merely declares that he shall have "the power to do so." His using, or failing to use, such discretionary power is merely a circumstance to be considered by the jury.

4. While the court may not prescribe any rule for the guidance of the register it would seem that "reasonable inquiry" involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register.

5. In an action against a register of deeds to recover the penalty under section 1814 of The Code, 2088-90 of the Revisal, the burden of proof is upon the plaintiff to show that the defendant knowingly or without reasonable inquiry, issued the license contrary to law.

FURR *v.* JOHNSON.

ACTION by E. A. Furr against W. Reece Johnson, heard by *Judge M. H. Justice* and a jury, at the May Term, 1905, of the Superior Court of CABARRUS. From a judgment for the defendant, the plaintiff appealed.

T. D. Maness and *Adams, Jerome & Armfield* for the plaintiff.

L. T. Hartsell and *Montgomery & Crowell* for the defendant.

CONNOR, J. This is an action against the register of deeds to recover the statutory penalty for issuing, without plaintiff's consent, a license for the marriage of his daughter who was under eighteen years of age and resided with him. The judge correctly charged that it was the duty of the register of deeds in issuing a marriage license "to make such inquiry for legal impediments to the marrige and as to the age of the parties as a prudent business man, acting in the most important affairs of life, would make, and to exercise his duties in this respect carefully and conscientiously, and not as a mere matter of form, and if the defendant failed to do so in the issuing of the license for the marriage of plaintiff's daughter, then he did not make reasonable inquiry, and the jury will answer the third issue "No."

Where there is a conflict of evidence, whether there has been "reasonable inquiry" is to be submitted to the jury upon all the evidence under proper instructions, but if the facts are agreed, it is a matter of law. *Joyner v. Roberts,* 114 N. C., 389; *Harcum v. Marsh,* 130 N. C., 154. The court instructed the jury, and we think properly, that if they found that "Goodman (the prospective groom) told the defendant that the girl was eighteen, for he had seen her age in the Bible and she had told him she was eighteen years of age; and should further find from the evidence that the defendant knew the witness, Lowder, well and knew him to be a man of

good character, and that he stated to Johnson that the girl was eighteen years of age, and that he lived just across the street from her family and signed the paper, not under oath, and that defendant honestly believed these statements and acted on them, believing them, the defendant made reasonable inquiry and you will answer the third issue "Yes."

We cannot concur with the plaintiff's contention that there was not reasonable inquiry because the witnesses were not examined by the register under oath. The Act of 1887, now Revisal, sec. 2088, does not require that the register shall make inquiry by examination of the witnesses in such cases under oath, but merely declares that he shall have "the power to do so." His using, or failing to use, such discretionary power is merely a circumstance to be considered by the jury. In *Agent v. Willis,* 124 N. C., 29, the examination of the witness was made by the register upon oath, but the court held that under the suspicious circumstances attendant upon that case there was not reasonable inquiry.

In *Trolinger v. Boroughs,* 133 N. C., 312, a rule easily understood and very proper to be followed is laid down: "While we may not prescribe any rule for the guidance of the register it would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care."

In regard to the plaintiff's exception to His Honor's instruction that the burden of proof was upon the plaintiff upon the third issue it may be said the statute gives to any one who will sue for the same a penalty to be recovered of "Every register of deeds who shall knowingly, or without reasonable inquiry, issue a marriage license for the marriage of any two

persons" within the inhibition. The cause of action, therefore, consists in the violation of section 1814 "knowingly and without reasonable inquiry." We cannot perceive why the burden of proof upon this issue is not upon the plaintiff. If the two first issues had been found for the plaintiff and no verdict upon the third issue had been rendered certainly no judgment could have been signed against defendant. The plaintiff would not have made out his case. It will hardly be contended that the court could, as matter of law, have instructed the jury to answer the third issue for the plaintiff because the defendant had introduced no evidence tending to show that he did not have knowledge or that he made reasonable inquiry; yet such is the duty of the court when the burden is upon the defendant and no evidence is introduced tending to persuade the jury to sustain his contention. Such is the basis and result of the application of the rule—the test. *Wallace v. Robeson*, 100 N. C., 207. If the general issue, as upon a plea of *non debet* had been submitted, the court would instruct the jury that before they could find for the plaintiff, he must show to them, by a preponderance of the evidence, a state of facts commensurate with the essential allegations of his complaint. The fact that the case was tried upon three issues does not change the rule. The burden of each issue remains on the plaintiff until he brings the acts of defendant within the penalizing language of the statute. While the burden of proving the issue is on the plaintiff he may, as a part of his proof, rely upon the facts shown by him, and defendant's failure to introduce testimony peculiarly within his knowledge and possession as tending to sustain his contention and to persuade the jury to so find. This is a very different matter from casting the burden of proof on the issue upon the defendant. The rule of practice is illustrated in many cases, as, for instance, when the plaintiff in actions to recover damage for negligence invokes the doctrine *res ipsa loquitur*. As in those cases the physical facts

for the plaintiff, he must show to them, by a preponderance of the evidence, a state of facts commensurate with the essential allegations of his complaint. The fact that the case was tried upon three issues does not change the rule. The burden of each issue remains on the plaintiff until he brings the acts of defendant within the penalizing language of the statute. While the burden of proving the issue is on the plaintiff he may, as a part of his proof, rely upon the facts shown by him, and defendant's failure to introduce testimony peculiarly within his knowledge and possession as tending to sustain his contention and to persuade the jury to so find. This is a very different matter from casting the burden of proof on the issue upon the defendant. The rule of practice is illustrated in many cases, as, for instance, when the plaintiff in actions to recover damage for negligence invokes the doctrine *res ipsa loquitur*. As in those cases the physical facts speak for themselves—so here the manner in which and circumstances under which, the defendants issued the license become evidential upon the question of knowledge or absence of reasonable inquiry. If the plaintiff relies upon the averment that the defendant knowingly issued the license in violation of the provisions of the statute, he certainly has the burden of proving the allegation. We are unable to see why the same rule does not obtain when he relies upon the averment that defendant did not make reasonable inquiry.

The rule laid down by *Judge Elliott,* in his work on Evidence, quoted in *Meredith v. Railroad,* 137 N. C., 478: "As a rule it is only where the fact negatived is peculiarly within the knowledge of the adversary, that the burden is, in any sense shifted to the latter, and even then it is the burden of going forward rather than the burden of ultimately establishing the case. The fact that the party having peculiar knowledge of the matter, fails to bring it forward, may raise a presumption or justify an inference in favor of his adversary's claim, and thus to shift the burden of proceeding in

correctly charged the jury that the burden of proof, on the issue, was upon the plaintiff. If the Legislature intended to make the issuing of the license contrary to the statute a *prima facie* case or presumptive evidence of knowledge or want of reasonable inquiry, it could easily have done so by making the matter one of defense by way of a *proviso,* or, as it frequently does, by declaring that the proof of certain facts should constitute presumptive evidence or declare them to be a *prima facie* case. Many of our criminal and penal statutes have such provisions. They have been sustained by this court. *State v. Barrett,* 138 N. C., 630.

The judgment must be

Affirmed.

SPRINKLE v. WELLBORN.

(Filed December 5, 1905).

Deeds—Mental Incapacity—Fraud—Innocent Purchaser—Fraudulent Vendee—Contracts of Lunatics—Presumption of Fraud — Relief Discretionary — Remedy — Issues — Harmless Error—Argument of Counsel—Evidence—Practice—Capacity to Contract.

1. In an action to set aside a deed for mental incapacity and fraud, under a finding that one of the defendants was a purchaser from his co-defendant for value and without notice of the mental incapacity of the grantor, and also without notice of any fraud of his co-defendant in procuring the deed, the plaintiff could not proceed further against such defendant and the cause was properly continued against the other defendant upon the theory that he is liable for the value of the land, less the amount paid by him therefor.

2. The contracts of idiots, lunatics and other persons *non compos* are generally regarded, in a certain sense, as invalid.

3. In regard to a contract entered into by a person apparently sane, before the fact of insanity has been established, such a contract is at most only voidable and will not be set aside when the other party to be affected by the decree of the court had no notice of the fact of insanity, has derived no inequitable advantage, and the parties cannot be placed *in statu quo*.

4. The mere fact that a man is of weak understanding, is not of itself an adequate ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance. But where mental weakness is accompanied by other inequitable incidents—such as undue influence, great ignorance and want of advice, or inadequacy of consideration—equity will interfere and grant either affirmative or defensive relief.

5. In the case of an insane person, one wholly incompetent to contract, the law presumes fraud from the condition of the parties, the presumption being stronger or weaker, according to the position or condition of the parties with respect to each other.

6. A presumption of fraud is raised from a transaction with a person *non compos mentis*, without the aid of any evidence of actual imposition, by the very nature of the transaction.

7. In an action to set aside a deed for mental incapacity and for fraud, the finding of the jury that the grantor did not have sufficient mental capacity and that the grantee had notice of this fact, is sufficient to invest the court with the power and to induce it to set aside the deed, if no real injustice is done to the grantee and no superior equity has intervened in favor of a third party, the granting of the relief resting in the sound discretion of the court.

8. The remedy of a vendor is not defeated where the fraudulent vendee has sold the property to an innocent purchaser, for in such case the proceeds of the sale are as available as the property itself. The fraudulent vendee becomes chargeable with the proceeds received from the innocent purchaser, but the property itself is not, and a personal judgment may be obtained against him.

9. In an action to set aside a deed for mental incapacity and for fraud where the jury found that there was not only a want of mental capacity, but that defendant knew of it and that he obtained the land at an under-value, an issue as to fraud was not essential to warrant a judgment against the defendant for the difference between the price for the land and its value, and the action of the court in striking out the answer of the jury to the issue as to fraud and substituting one of its own resulted in no legal wrong to the defendant.

10. The court had the power to set aside the verdict of the jury, but it had no power to reverse the answer of the jury. As the judgment is not affected by this action, it is not reversible error and the case is left as if that issue had not been submitted.

11. Where evidence was introduced for the consideration of the court alone and this was fully explained to the jury, the fact that counsel commented upon it, cannot be made the ground for exception now, where no objection was made at the time.

12. In an action to set aside a deed for mental incapacity, the record in the case in which plaintiff's marriage was annulled on the ground that she did not have sufficient mental capacity to enter into the contract of marriage was incompetent as substantive testimony and properly excluded.

13. A judge is not obliged to repeat instructions already given, even when especially asked to do so in a prayer.

14. A person has mental capacity sufficient to contract if he knows what he is about and the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, not that he should be able to act wisely or discreetly nor to drive a good bargain, but he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly.

15. Where an issue has been eliminated from the case by the verdict upon other issues, any error committed as to instructions relating to such issue was harmless.

16. In an action to set aside a verdict for mental incapacity, where it appears that the defendant was a kinsman and neighbor of the grantor and had known her all his life, and that at the time she made the trade with him, she was wild and hardly seemed to know her whereabouts, that he procured the deed away from her home, having taken her away from those who could have advised her and falsely stated that he was going on another matter, that she suddenly changed her mind and was so weak as to be completely subjected to his power and dictation, ***held,*** this evidence is sufficient to support the finding that the defendant had notice of the grantor's incapacity at the time she made the deed to him, the jury not being bound by his statement that he did not know she was insane.

ACTION by Nancy E. Sprinkle, by her Guardian, W. R. Sprinkle, and others, against J. M. Wellborn and T. J. Greenwood, heard by *Judge Chas. M. Cooke* and a jury, at the June Term, 1905, of the Superior Court of WILKES.

This action was brought by the plaintiff, Nancy Elvira Sprinkle, who is represented by her guardian, W. R. Sprinkle, against the defendant, J. M. Wellborn, to set aside a deed made by the said Nancy Elvira Sprinkle to the defendant Wellborn on the 19th day of October, 1886, for want of mental capacity to make the same and for fraud and undue influence in procuring the execution of the said deed. Issues were submitted to the jury which, with the answers thereto,

are as follows: "(1) Did Nancy E. Sprinkle, at the time of executing the deed of October 19, 1886, have sufficient mental capacity to make the same? A. No. (2) If Nancy E. Sprinkle had not sufficient mental capacity at such time to make such deed, did J. M. Wellborn have notice of it? A. Yes. (3) Was any fraud or undue influence practiced on Nancy E. Sprinkle by J. M. Wellborn, to induce her to make such deed? A. No. (4) What was the amount of the benefit derived by Nancy E. Sprinkle from the consideration for the deed to the River Farm? A. (by consent) $1,299 (the amount of the Salmons mortgage debt), the value of the Mountain or Miller tract of land, the value of the cattle delivered to her, and all as of date October 19, 1886. (5) What was the value of the River Farm, October 19, 1886? A. $4,000. (6) What has been the average annual rental value of said River Farm since October 19, 1886? A. $200. (7) What was the value of the Mountain or Miller tract October 19, 1886? A. $1,500. (8) What has been the average rental value of said Mountain or Miller tract since October 19, 1886? A. $75. (9) What was the value of the cattle received by Nancy E. Sprinkle in said trade? A. $75. (10) If the said Nancy E. Sprinkle had not sufficient mental capacity to make said deed, did the defendant Greenwood have notice thereof? A. (by consent) No. (11) Was the defendant Greenwood a purchaser for value without notice of any fraud on the part of Wellborn to procure the deed to himself, if any such was practiced? A. (by consent) Yes." There was no objection to the issues. It is not necessary to state the evidence. It was voluminous, but the only material portion of it will be stated in the opinion.

The defendant requested the court to give a number of instructions, all of which were given except those numbered 3, 13 and 14, which will be noticed hereafter. The material instructions given in response to the defendant's prayers, upon the issue as to mental capacity, were as follows: "1.

The law fixes no particular standard of intelligence necessary to be possessed by parties in making a contract, and although a person may not have sufficient intelligence to manage his affairs in a proper and prudent manner, still he may be capable of making a binding contract. 2. It is not required that a person should be able to make a disposition of his property with judgment and discretion. It is sufficient if he understands what he is about. If a person knows what he is doing and is aware of the nature of the particular transaction, such person has sufficient mental capacity to make a contract, although that person may not act wisely or discreetly, or make a good bargain. 3. If the jury find from the evidence that on the 19th of October, 1886, Nancy E. Sprinkle had sufficient mental capacity to understand what she was about and the nature and extent of the property when she executed the deed, and that she understood the nature and effect thereof, they will answer the first issue yes, although they also find from the evidence that she was eccentric and that her mind was weak and flighty and that the trade she made was not a prudent one and was not made in the exercise of discretion and good judgment. 4. If the jury find from the evidence that at the time the deed was executed, to-wit, October 19, 1886, Nancy E. Sprinkle had sufficient mental capacity to understand and appreciate that she was making a deed by which she passed the title to the River Farm to the defendant Wellborn, that she was depriving herself of the ownership and control thereof, and that she was getting in exchange therefor the farm in Ashe County and the cattle mentioned in the evidence, and that the mortgage to Salmons was to be paid by the defendant, then they will answer the first issue yes, although they may also find that it was not a prudent trade and was not made with discretion and good judgment. 5. Mere weakness of mind and susceptibility to undue or fraudulent influences, however clearly shown, will not vitiate a contract unless it was induced

by fraud. Where there is a legal capacity there cannot be an equitable incapacity apart from fraud. If a person be of sound mind, he has the right to dispose of his property, and his will stands in place of a reason, provided the contract justified the conclusion that he exercised deliberate judgment such as it is and has not been circumvented or imposed upon by artifice or undue influence which amounts to fraud." The following instructions, which the defendant requested the court to give the jury, were refused: "1. Unless the mind of such person is wholly incapable of any reflection or deliberate act so that in fact he was unaware of the nature and effect of the particular transaction, such person in the eye of the law has sufficient mental capacity to make a contract. 2. Upon all of the evidence, the jury is instructed that the defendant Wellborn did not have notice of any mental incapacity of Nancy E. Sprinkle, if any such existed. 3. The jury will answer the third issue no." The court then charged the jury generally as follows: "Those who allege insanity, idiocy, imbecility and incapacity must prove it by the greater weight of the evidence; must overcome the legal presumpton of soundness of mind. Has the plaintiff overcome this presumption of law? If so, you will answer the first issue no, and thereby declare that, when she made the deed, Elvira Sprinkle did not have that mental capacity which the law requires of those who dispose of their property. The law does not require that a person be able to dispose of his or her property with judgment and discretion, or be able to get the best of a trade. It is sufficient in law if he or she understands what he or she is doing and what they are about. The law does not require a high degree of intelligence, but it does require sufficient mind to know and comprehend the character of the act and to know what one is doing. Did Elvira Sprinkle, when she made the deed to the River Farm, know what she was about; know the effect of the instrument she was signing; know that she was parting with her land

and getting the land in Ashe County and the cattle and the payment of the mortgage in return? If she did not fully comprehend this, you will answer the issue no; otherwise you will answer it yes. You understand, of course, that you are inquiring into the contract of Elvira Sprinkle on October 19, 1886. Was she sound then and of sufficient mental capacity to make the deed on that day? Where one has sufficient mental capacity at the time he signs the deed to understand the nature and extent of the property disposed of, and the force and effect of his act in signing the deed, then he is capable of executing a deed. If you find that Nancy Sprinkle, at the time she signed the deed on the 19th October, 1886, had mind and intelligence sufficient to enable her to have a reasonable judgment of the kind and value of the property embraced in the deed, and to understand the effect of her act in making the deed, you should answer the first issue yes. But if you shall find that she did not have such mind and intelligence as stated, you will answer the first issue no."

The court instructed the jury on the law applicable to the other issues, recapitulating the evidence by grouping the same as applicable to the different issues, and explained the law arising thereon. The court instructed the jury as to the difference between substantive evidence and corroborating and impeaching evidence, and then instructed them further as follows: "The evidence of statements made in this case, by witnesses other than the parties to this suit, different from and inconsistent with the testimony given by such witnesses on this trial, was allowed only for the purpose of impeaching such witnesses, and is not to be considered as substantive evidence. Evidence of the statements of witnesses, which accord with their evidence on the trial, is only allowed for the purpose of corroborating such witnesses, and is not to be considered by the jury as substantive evidence." After the verdict was returned, the court found that the answer of the

jury to the third issue was against the weight of the evidence, and set it aside; and that, upon the responses to the other issues, there was fraud in law. The court thereupon answered the third issue "Yes." The defendant excepted. During the trial the plaintiff introduced in evidence the record entitled, "In the Matter of the Inqury into the Mental Condition of Nancy E. Sprinkle," which was a proceeding instituted in 1893, under the statute, the record showing the appointment of W. R. Sprinkle as her guardian. In the said proceeding, the jury found that she was "incompetent to manage her own business." The plaintiff then introduced the record in the case of *Nancy Sims, by her Guardian, v. W. M. Sims,* in which her marriage to the defendant was annulled by a judgment of the court based upon the verdict of a jury that she did not have sufficient mental capacity to enter into the contract of marriage. The records were each duly objected to by the defendant. The objections were overruled and the defendant excepted. The records were offered solely for the consideration of the court, and in respect to them the following facts are stated: "The court held that these records were admitted only for the purpose of consideration by the court upon the question whether or not the defendant Wellborn was competent to testify as to the conversations and transactions between himself and the plaintiff—the objection to his competency being that she was now a lunatic, and the court so stated in the presence of the jury."

The defendant then introduced the record of the second inquiry into the sanity of Nancy Sims, dated August, 1895, in which the jury found that she was sane and "competent to transact the ordinary business of life." The plaintiffs contended that the records they introduced should be admitted as evidence for the jury to consider, and the defendants insisted that the records they introduced should be admitted in the same way. The judge excluded all the records as evidence for the jury, but stated that if he should

decide later to admit the records as evidence, he would so announce. The court did not decide to admit them as evidence. The defendant then read the deposition of Governor Glenn. After the close of the evidence and while one of the counsel was addressing the jury, an attorney for the plaintiff came up to the bench and said to the judge that as Governor Glenn's deposition had been introduced, he thought the court ought to allow the records to go to the jury as evidence, and wanted to know if the court would let him argue to the jury that they were evidence. The court said no, that those records were not in evidence, and that he must not refer to them in argument. The judge was engaged, during the arguments, in preparing instructions and considering the prayers for instruction handed up to him just before the argument commenced, and did not pay any attention to the arguments of counsel, and did not know until after the verdict had been rendered, that counsel in their arguments had referred to the said records as evidence; but the court finds, after hearing the evidence of the attorneys, that one of the four attorneys for the plaintiff who addressed the jury (but not the one referred to above), in his argument, did refer to the said records as evidence, and that the attorneys for the defendant also in their reply referred to the said records as evidence and discussed the same. The attention of the court was not called to this, nor any objection made to it during the argument; but the defendant, after verdict, called the court's attention to it, and moved to set aside the verdict on that ground. The counsel for the plaintiff, who referred to the records as evidence, had not been advised of what the court had said to his associate, neither had the counsel for the defendant.

There was a motion for a new trial based upon errors committed during the progress of the trial and objections to the argument of counsel, as appears in the finding of the court, which motion was overruled. Judgment for the plaintiff and the defendant appealed.

Shepherd & Shepherd and *T. B. Finley* for the plaintiff.

W. W. Barber, R. A. Doughton and *Manly & Hendren* for the defendant.

WALKER, J., after stating the case: The jury found in this case, by consent, in their answers to the 10th and 11th issues, that the defendant, T. J. Greenwood, had purchased the land in controversy for value and without notice of the mental incapacity of Nancy Elvira Sprinkle, and also without notice of any fraud of Wellborn, if there was any, in procuring the deed. Counsel for the plaintiff properly admitted that, under this finding, they could not proceed further against Greenwood, and the cause was therefore continued against Wellborn on the theory that, upon the verdict, he is liable for the value of the land, less the amount paid by him therefor, and for the difference between these two amounts, judgment was rendered in the court below. There is no serious contention, as we understand, that the defendant is not so liable, if the rulings of the court, as to all issues except the third, and consequently the verdict and the judgment, are free from error and can be sustained, though it was suggested that the liability was not so clearly apparent as to be conceded or taken for granted, without any good reason given or any authority cited to establish it. We will, therefore, consider this question before passing to the discussion of the other matters. The first essential element of a contract is consent, and there can be no true agreement without the capacity to understand it and freedom to accept or to reject the terms proposed. The parties must be able and willing to contract. If, therefore, one person induces another, who lacks this capacity or this freedom, to enter into an apparent contract, equity will not recognize the transaction, however, as one author says, it may be fenced by formal observances, but deeming it fraudulent, will in proper cases afford relief against it at the suit of the party

imposed upon. Fetter on Equity, 143. On this ground the contracts of idiots, lunatics and other persons *non compos mentis* are generally regarded, in a certain sense, as invalid. It has been said by many courts that the contracts of a lunatic made after the fact of insanity has been judicially ascertained, are absolutely void and that he can have no power to contract at all until there is a reversal of the finding and he is permitted to resume control of his property. Fetter, 143; *Odom v. Riddick,* 104 N. C., 515. We need not decide what is the law in this respect, as there had been no inquisition of lunacy at the time the deed in this case was executed. We will have occasion, though, to advert to the nature and effect of such an inquisition hereafter in discussing another question. In regard to a contract entered into by a person apparently sane, before the fact of insanity has been judicially established, the law is well settled, we believe, that such contracts are at most only voidable and will not be set aside when the other party to be affected by the decree of the court had no notice of the fact of insanity, has derived no inequitable advantage and the parties cannot be placed *in statu quo.* The reason for this distinction between contracts made when there has been office found and those when there has not, is said by the authorities to be plain. "Insanity is one of the most mysterious diseases to which humanity is subject. The ripest professional skill and the keenest observation sometimes fail to detect it in its incipient stages. Sound law and good morals, therefore, alike forbid the rescission of a contract on the ground of insanity by one who is unable or unwilling to restore the property acquired thereunder to the other party, who entered into it in good faith, in entire ignorance of the insanity, and without taking any advantage by reason thereof." Fetter on Equity, pp. 143, 144; Eaton on Equity, 316. "The mere fact that a man is of weak understanding, or is below the average of mankind in intellectual capacity, is not of itself an adequate ground

to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance. But where mental weakness is accompanied by other inequitable incidents—such as undue influence, great ignorance and want of advice, or inadequacy of consideration—equity will interfere and grant either affirmative or defensive relief." Eaton on Equity, p. 317. In the case of an insane person, one wholly incompetent to contract, the law presumes fraud from the condition of the parties, the same as it does in the case of a contract of a person under duress or undue influence, or of contracts between persons occupying a fiduciary relation. The presumption is stronger or weaker according to the position or condition of the parties with respect to each other. Fraud vitiates all contracts, but, as a general rule, it is not presumed but must be proved. Proof is not dispensed with, but there are certain well defined relations as there are certain facts when established, from which the law presumes fraud and which, though not necessarily binding upon the jury, may answer as plenary proof of the fraud unless the innocence of the party charged with its commission in some way appears. *Lee v. Pearce,* 68 N. C., 76.

In the classification of frauds, of which a court of equity takes cognizance, the kind which is said to be presumed from a transaction with a lunatic is to be referred to the well known head of constructive frauds. Eaton's Equity, 314. *Lord Hardwicke,* for the purpose of convenient consideration, divided the subject of fraud into four classes: "1. Fraud arising from the facts and circumstances of imposition. 2. Fraud arising from the intrinsic matter of the bargain itself. 3. Fraud presumed from the circumstances and condition of the parties contracting. 4. Fraud affecting third persons not parties to the transaction." *Earl of Chesterfield v. Janssen,* 2 Ves. Sr., 125. This classification has generally been adopted.

Our case falls under the third head, as does also a contract

with a person so far drunk that he is substantially *non compos mentis* and not capable of apprehending the effect of what he does. The presumption is raised without the aid of any evidence of actual imposition, from the very nature of the transaction. Adams' Eq. (5 Am. Ed.), sec. 182, pp. 364, 365; Bispham (3 Ed.), sec. 230; Eaton and Fetter, *supra; Odom v. Riddick, supra; Cameron v. Power Co.,* 138 N. C., 365. *Lord Hardwicke,* in the case from Vesey, we have cited, says: "A third kind of fraud is that which may be presumed from the circumstances and conditions of the parties contracting; and this goes further than the rule of law, which is that it must be proved, and not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance." It results from these authorities, if we bring the facts of this case to the test of the principles stated in them, that the finding of the jury upon the first and second issues was quite sufficient to invest the court with the power and to induce it to set aside the deed to Wellborn, if no real injustice is thereby done to him and no superior equity has intervened in favor of a third party, for the plaintiff is not entitled to rescission and cancellation as matter of right, because the granting of that relief rests in the sound discretion of the court and it will not decree such relief if it will work any injustice in the particular case. Bispham's Eq., sec. 475. The equity will not always be enforced, for instance, in a case where the *status quo ante* as stated and illustrated in *Odom v. Riddick, supra,* cannot be fully restored. No such consideration though is present in this case, as the very nature of the particular relief which is sought will permit the administration of such equitable relief with even and exact justice to all parties. Greenwood is found to be a purchaser for value and without notice and is entitled to the special favor and protection of a court of

equity. The deed to him must be upheld as effectual to vest a good and indefeasible title, not only as against his vendor, but also as against the plaintiffs, for his equity is superior to theirs. But this does not deprive the plaintiffs of all relief. It is a familiar principle that when a fraudulent vendee has conveyed the property in question to a third party who, by reason of his innocence, acquires a good and valid title as against the equity of the original vendor, the latter has a remedy against the substituted property, in this case the purchase money received from Greenwood, and the defendant will be held liable for the amount thereof subject to any deductions for sums paid to the plaintiff at the time the deed was made and to any other payments rightfully made by him to protect the title, such as the one made in this case to disincumber the land. Upon this principle was the judgment of the court rendered, and we think that it works out the equity of the plaintiff and at the same time does full justice to the defendant. In this respect, this case is unlike that of *Odom v. Riddick*. That the plaintiff was entitled to proceed against the defendant for a personal judgment is settled by the highest authority. *Smith*, in his admirable Treatise on the Equitable Remedies of Creditors, at pp. 28 and 29, when speaking of a fraudulent conveyance, says: "(1) The remedy of a creditor is not defeated where the fraudulent grantee has sold the property to an innocent purchaser, for in such case the proceeds of the sale are as available as the property itself. The fraudulent grantee becomes chargeable with the proceeds derived from the innocent purchaser, but the property itself is not. (2) It is not essential that the precise property fraudulently conveyed shall remain in the hands of the fraudulent grantee to entitle the plaintiff to a recovery. Thus, the grantee may have exchanged the fraudulently conveyed property for other property still held by him, in which case the fraud will be impressed upon the latter property in lieu of the former. (3) Where it is sought to

follow property fraudulently conveyed and procure a decree against the property, which is subsequently reversed, complainants are not precluded from taking a different course and procuring a different decree based on the evidence on final hearing, such as a personal decree against the fraudulent grantee." See also 1 Pom. Eq. Jur. (1905), sec. 237, and 240. In *Texas v. Hardenberg,* 77 U. S. (10 Wall.), 68, *Chase, C. J.,* for the court, says: "It may be admitted that these allegations and interrogatories do not assert the right of the complainant to the proceeds with absolute directness and distinctness. The bill might have been drawn better. But we think it would savor of extreme technicality to refuse to see in the bill enough in relation to the proceeds of the bonds to warrant relief in this respect under the general prayer. Willing to allow this defendant the benefit of any defense consistent with the rules which govern proceedings in equity, we have looked into the question as if it were still open. Having thus looked into it, we find no sufficient ground for altering the conclusion embodied in the decree." The last expression of the court refers to a clause in the decree awarding a recovery of the proceeds of the bonds which had been sold. *Jones v. Van Doren,* 130 U. S., 684. (The rule, and the reason for it, are clearly and tersely stated by *Earl, J.,* in *Murtha v. Curley,* 90 N. Y., at 378: "A court of equity adapts its relief to the exigencies of the case in hand. It may restrain or compel the defendant; it may appoint a receiver, or order an accounting; it may decree specific performance, or order the delivery to the plaintiff of specific real or personal property; or it may order a sum of money to be paid to the plaintiff, and give him a personal judgment therefor." When the property has been converted, as in this case, there is no longer any need for a decree vacating the fraudulent deed, but the court will simply declare that the deed is void as between the plaintiff (Nancy Sprinkle) and her fraudulent grantee and award such relief as is proper

in the premises. Wellborn, having sold the land to a *bona fide* purchaser, and thereby deprived his vendor of the land itself and, having received the price, he must, by reason of his fraudulent disposition of property which he is considered to have held in trust and of its conversion into money, be held responsible for the amount of the consideration paid to him. The money in his hands stands for the land. Wait Fraud. Conv. (3 Ed.), sec. 178; *Holland v. Anderson,* 38 Mo., 55; *Lawrence v. Bank,* 35 N. Y., 320; *Dilworth v. Carts,* 139 Ill., 508; *Hazen v. Bank,* 70 Vt., 543. But the administration of this relief is eminently proper under the reformed procedure, where the rights of parties are settled and determined in one action, the distinction between actions at law and suits in equity having been abolished. 1 Pom. Eq. Jur., sec. 242. Our conclusion, therefore, is that by the verdict of the jury upon the issues, excluding altogether the third issue, the plaintiffs were entitled to the relief which was adjudged to them. The third issue was submitted only to ascertain whether there had been any actual fraud or undue influence used to obtain the deed, should the jury have found that Nancy Sprinkle was not insane, that is devoid of all mental capacity, but merely weak-minded and an easy prey to the domination and overruling influence of the defendant, who availed himself of her weakness and of his power over her to secure the execution of the deed to himself by undue means, thus presenting an alternative equity for the rescission and cancellation of the deed. The issue was in no way essential to the relief granted, as the jury found not only that there was want of sufficient mental capacity, but that the defendant knew of it, at the time he got the deed, and in addition thereto that he obtained the land at an under-value. It seems to us that it would be a reproach to the law and to the administration of justice under its forms, if such a transaction were permitted to stand. But we do not think there can be found in the

books any principle which would cause us to hesitate in the least, so far as this objection is concerned, to pronounce its condemnation and to sustain the judgment of the court, which requires the defendant to surrender any gain or benefit he has derived from it.

It follows from what we have already determined, that the action of His Honor in striking out the answer of the jury to the third issue and substituting one of his own, has resulted in no legal wrong to the defendant, which requires a reversal or even a modification of the judgment. There was error in doing so, but not reversible error. The court had the power to set aside the verdict, as to that issue, that is *pro tanto,* but none to reverse the answer of the jury. This was an invasion of their province, but the defendant cannot complain of it as it worked no material injury in law to him. The order setting aside the verdict upon that issue is sustained, as the court merely exercised its discretion to that extent, but in other respects it is reversed and the answer of the court to that issue will be expunged. That is but just to the defendant. The court, as it appears in the record, was induced to take the course it did under the belief that, as the answers to other issues showed, "fraud in law," the proper answer to the third issue should be an affirmative one. In this there was error, as we have said, but the judgment is not affected by it, and the case is left as if that issue had not been submitted at all.

The objection to the records of the inquisition of lunacy is untenable. The case shows that they were introduced for the consideration of the court alone, in order to decide upon the competency of a witness, and this was fully explained to the jury. If counsel of plaintiff commented upon them, no objection was made at the time and, not having been made then, it cannot be made now. *State v. Tyson,* 133 N. C., 692; *Horah v. Knox,* 87 N. C., 483. Besides, the defendant's counsel, instead of calling the court's attention to those

comments, replied to them himself, and it must be taken, therefore, that any objection to them as being improper was thereby waived. The defendant cannot be permitted to take two chances. He should have acted promptly if he intended to avail himself of any objection to what plaintiff's counsel said to the jury about the records. It may well be doubted if the recent rule of this court, Rule 27 (135 N. C., 600), is not also a full answer to this objection. Those records of course were not and could not have been considered as evidence for the jury. They were made after the date when the deed was executed and the proceedings in which they were made were *ex parte*. If made before that time, they might have been competent, but not conclusive as to the insanity of Nancy Sprinkle. The presumption arising from them in such a case could be rebutted and the very truth be made to appear, that is, that while they showed insanity, it did not in fact exist at the time the deed was executed. This is at least true as to all persons not parties or privies to the inquisition, as for example, a grantee of the lunatic, who being a stranger to the inquisition could not traverse it, which was formally done by *scire facias*. *Rippy v. Gant*, 39 N. C., 443; *Arrington v. Short*, 10 N. C., 71; *Christmas v. Mitchell*, 38 N. C., 535; *Parker v. Davis*, 53 N. C., 460. The doctrine is fully discussed and the reasons for the same fully and clearly stated by *Taylor, C. J.*, in *Armstrong v. Short*, 8 N. C., 11. But it is useless to discuss the matter any further, as the records were not admitted as evidence generally, and the court has done nothing, nor has it failed to do anything with respect thereto of which the defendant has any right to complain. The record in the case of *Sims v. Sims*, was clearly incompetent as substantive testimony. It was properly excluded.

The defendant's third prayer for instructions was properly refused. The substance of it had been given by the court in its response to his first and second prayers and afterwards,

in its general charge to the jury, the defendant was given the full benefit of the principle stated in his third prayer. A judge is not obliged to repeat his instructions already given, even when specially asked to do so in a prayer. The instructions as given were quite sufficient to cover the case. *Bost v. Bost,* 87 N. C., 478; *Morris v. Osborne,* 104 N. C., 609. We have said in *Cameron v. Power Co.,* 138 N. C., 365, which sustains the charge of the court, that this court has adopted *Coke's* definition, that a person has mental capacity sufficient to contract if he knows what he is about (*Moffit v. Witherspoon,* 32 N. C., 185; *Paine v. Roberts,* 82 N. C., 451), and that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly. There is no particular formula to be used in such cases, as said by the court in *Morris v. Osborne, supra,* but the law in this respect should be explained to the jury with reference to the special and peculiar facts of the case being tried, and under the guidance of such general principles as have been settled and declared by the courts.

The remaining exceptions to be noticed were taken to the refusal of the court to instruct the jury as requested by the defendant in his 13th and 14th prayers, and to the giving of the instruction requested in the 4th prayer of the plaintiff. The last two relate to the third issue, and as that issue has practically been eliminated from the case by the view we have taken of the law in respect to the verdict upon the other issues, there is no need of giving them further consideration, as they have become immaterial, and any error committed as to them, if error there be, was harmless. So that we come finally to the question raised by the refusal

to give the instruction contained in the defendant's 13th prayer. Was there any evidence that the defendant had notice of the incapacity of Nancy Sprinkle at the time she made the deed to him? We think there was not only some but ample evidence to sustain the finding of the jury. We forbear to discuss the evidence at length or in detail for the purpose of showing that it was sufficient to support the verdict of the jury. It appears that the defendant was a kinsman and neighbor of Nancy Sprinkle and had known her all his life, with the exception of a few years when he was in the West. He knew the condition of her mind. It is true he says he did not know she was insane, but the jury were not bound by this statement, and might well conclude, in view of his knowledge of her when considered in connection with the overwhelming proof as to her mental imbecility and especially when coupled with other facts and circumstances tending to show his guilty knowledge, that he must have been aware of her true mental condition. Other circumstances are that at the time she made the trade with him, her mind was so unbalanced that, in the language of one of the witnesses, "she was wild and hardly seemed to know her whereabouts." The manner in which he procured the deed, taking her away from those who could have advised her in so important a transaction and stating that he would not trade with her unless Fletcher Harris, her friend, was present, and that he was only going to the upper part of the county to get some evidence for her in her pension matter, when it turned out he was then preparing to carry her to Wilkesboro for the purpose of taking advantage of her mental weakness by inducing her to make the deed, and this he easily accomplished; her sudden change of mind when she had just told Parks that she would not make the deed—all this, and more, was evidence for the jury upon the question of her mental capacity. So weak was she that she was completely subjected to the

power and dictation of the defendant, and he must have known it if the testimony introduced by the plaintiff was credible, and the jury have said that it was. If there was any mental operation required in the transaction, it was all on his side. It seems that he could, at pleasure, mould her will to suit his own, so like was she to clay in the hands of the potter. It is needess to prolong the discussion. To-be-sure there was evidence in conflict with that offered by the plaintiff, but we are considering the version of the facts relating to the first and second issues, which was apparently accepted by the jury as the true one, and, besides, we are only required to decide whether there was any evidence of the facts to be proved, namely, the insanity and the defendant's knowledge of it.

Whether there is any difference, in moral quality, between the act of obtaining a deed for land from a woman known to be totally bereft of reason and the act of procuring one from a woman merely of weak understanding, who is unable to guard herself against imposition or to resist importunity, it does not lie within our province to decide but in law, and in so far as the validity of such transaction may be involved, we know that there is not and should not be any difference, and that either is sufficient to induce a court of equity to rescind the contract and cancel the deed, or to require the vendee to give up what he has unfairly and unjustly received, with proper deductions for any sums paid out by him, if the specific remedy of rescission and cancellation cannot equitably be administered.

There being no error in any of the rulings of the court to which exception has been taken, the verdict must stand undisturbed, and, excluding from consideration the third issue, what is left of it is certainly sufficient to warrant the judgment. 1 Bigelow on Fraud, 374; Pomeroy's Eq. Jur. (1905), sec. 947. As suggested by counsel, a court of equity would

abdicate one of its most important and characteristic functions, if it were to give effect to a transaction conducted under such circumstances as those established by the issues left standing by the court.

No Error.

BETTIS v. AVERY.

(Filed December 5, 1905).

Descent and Distribution—Statutes—Slaves — Marriage — Illegitimates—Ejectment—Title.

1. The Act of 1866, chap. 40 (Code, sec. 1842 of The Code), fixed the marital relations of former slaves, who were living together as man and wife, providing that those who thus cohabitated at the date of the ratification of the act should be deemed to have lawfully married, with a provision for acknowledgment before the clerk or justice of the peace.

2. The Act of 1879, chap. 73 (Code, sec. 1281, Rule 13), legitimates the plaintiff, the child of colored parents, who was born before the first day of January, 1868, and merely extended the child's right of inheritance to the estate of the father, which was before that restricted to the estate of the mother, but it does not transmit any title to the plaintiff, who is claiming the land in dispute as heir of an illegitimate first cousin.

3. The plaintiff, who is a legitimate and is claiming under a collateral kinsman of her mother, is excluded from any benefit under Rule 9 of section 1281 of The Code, which refers only to a lineal descendant from a mother to her illegitimate child and its descendants and not to any collateral descendant from her kindred to the child as her representative.

4. The last clause of Rule 9, section 1281 of The Code, excludes the right to inherit, as the representative of an illegitimate mother, any part of the estate of the latter's kindred, either lineal or collateral.

5. The plaintiff, a legitimate, who does not claim directly from a brother or sister, or from the issue or heirs of either, but from an illegitimate first cousin, comes within neither the letter nor the reason of Rule 10 of section 1281 of The Code.

6. In an action of ejectment, it makes no difference whether the defendant has any title or not, for the plaintiff can succeed only on the strength of his own title as being good against the world or good against the defendant by estoppel.

ACTION by Clara Bettis against Wash Avery and others, heard by *Judge W. R. Allen,* upon a case agreed, at the August Term, 1905, of the Superior Court of BURKE.

The plaintiff brought this action to recover the tract of land containing 21½ acres described in the pleadings, and it was heard upon the following case agreed: 1. Matilda Greenlee, who died before 1861, was the mother of Adam Bettis and Clarissa Greenlee. 2. Clarissa Greenlee was the mother of Austin Greenlee. 3. Adam Bettis was the father of the plaintiff, Clara Bettis. 4. Matilda Greenlee, Adam Bettis, Clarissa Greenlee and Austin Greenlee were slaves. 5. Clarissa Greenlee died about twenty years ago, Austin died afterwards, about seventeen years ago, and Adam Bettis died a year or two before Austin. 6. Adam Bettis and his wife were married during slavery and lived together as man and wife before emancipation and, afterwards, until the date of the death of one of them, which was sometime after the year 1866, their child (the plaintiff Clara) having been born prior to the first day of January, 1868. 7. Austin Greenlee was the owner of the land in dispute, having acquired title by deed, dated March 25, 1878. He died seized and possessed of the land in fee simple. 8. Austin Greenlee married Laura Greenlee, who died after the death of her husband, leaving a daughter by another marriage, named Malinda, who married Wash Avery. They are the defendants in this case. 9. Austin Greenlee died intestate in Burke County without ever having had any children. 10. Laura, the

widow of Austin Greenlee, lived on the land in dispute after the death of the said Austin and until within a year prior to the beginning of this action, which was commenced July 31, 1903.

The court was of opinion that upon the said facts the plaintiff is the owner of the land, and rendered judment in her favor, from which the defendant appealed.

F. H. Busbee & Son for the plaintiff.
S. J. Ervin for the defendant.

WALKER, J., after stating the case: The plaintiff's right to recover in this action depends upon the true meaning of our statute of descents in regard to former slaves and illegitimates, and their rights of property and inheritance growing out of their peculiar status. It seems to us that by a reasonable construction of our statute, whether it is based upon the letter or the evident intention of the Legislature, the plaintiff's claim to the land in dispute must fail. She would not have the shadow of a title, if the case were decided according to the principles of the common law. But our statute has superseded those principles, and her right, if any she has, must rest solely on some provision of the statute. The Legislature took early action after the war to fix the marital relations of former slaves, who were living together as man and wife, by passing the Act of 1866, chapter 40, section 5; and providing that those who thus cohabited at the date of the ratification of the act should be deemed to have been lawfully married as man and wife, with the provision for acknowledgment before the clerk or a justice of the peace and for making a record of the fact. This act was construed and held to be valid in *Long v. Barnes*, 87 N. C., 329; *State v. Adams*, 65 N. C., 537, and *State v. Whitford*, 86 N. C., 636. The act was upheld as constitutional, the necessary consent thereto being supplied by continuing cohabita-

tion, and the provision as to acknowledgment was considered to be directory, so that a failure to comply with it, though a misdemeanor, did not affect the validity of the marriage. This statute is not material in this case, except in so far as it establishes the legitimacy of the plaintiff. There are no facts stated which would cause it to change the status of Adam Bettis and Clarissa Greenlee as illegitimates, for their mother, Matilda Greenlee, died in 1861, a slave; nor are there any to show the legitimacy of Austin Greenlee, who was born in slavery of a slave mother, Clarissa Greenlee. The Act of 1866 (Code, sec. 1842), was followed by the Act of 1879, chapter 73 (Code, sec. 1281, Rule 13), which provided that "the children of colored parents born at any time before the first day of January, 1868, of persons living together as man and wife are hereby declared legitimate children of such parents or either one of them, with all the rights of heirs at law and next of kin, with respect to the estate or estates of any such parents, or either one of them." This act merely legitimates the plaintiff as the child of Adam Bettis and his slave wife, which, perhaps, was already done by the Act of 1866, but it cannot be held to transmit any title to the land in dispute from Austin Greenlee to her, as it refers exclusively to the descent to such a child of the "estate or estates of its parents, or either one of them," and merely extended the child's right of inheritance to the estate of the father, which before that was restricted to the estate of the mother. In this case, the plaintiff is not claiming the land as the heir of her father or of her mother, but as heir of an illegitimate first cousin. That provision of the law, therefore, does not apply. *Tucker v. Bellamy,* 98 N. C., 31; *Jones v. Hoggard,* 108 N. C., 178. These two special statutes may, therefore, be laid out of the case, and the plaintiff having no right at common law is driven to claim under the statute of descents, applicable to illegitimates generally. It is true that she is a legitimate, but she is claiming collaterally

from an illegitimate who is not her brother, they being the children respectively of an illegitimate brother and an illegitimate sister. Her case must then be brought within the provisions of either Rule 9 or Rule 10 of chapter 28 of The Code. The first of those rules is as follows: "When there shall be no legitimate issue, every illegitimate child of the mother and the descendant of any such child deceased, shall be considered an heir, and as such shall inherit her estate; but such child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral."

It is apparent that the rule just quoted refers only to a lineal descent from a mother to her illegitimate child and its descendants, and not to any collateral descent from her kindred to the child as her representative. These are the very words of the act, and the language is too clear and unmistakable for any reasonable doubt as to what is meant. Again, we say, bringing our case to the test of this rule, the plaintiff is not claiming as the illegitimate child of her mother, because, first, she is a legitimate, and, second, she is claiming under a collateral kinsman of her mother. So that, in every possible view, she is excluded from any benefit under that rule. *Flintham v. Holder,* 16 N. C., 345; *McBryde v. Patterson,* 78 N. C., 415; *Sawyer v. Sawyer,* 28 N. C., 407. If the plaintiff traces her right to inherit from Austin Greenlee back through her illegitimate father (Adam Bettis) to her grandmother (Matilda Greenlee) and then down from her through her illegitimate daughter (Clarissa Greenlee) to Austin Greenlee, the son of Clarissa, she is equally unfortunate, as such an inheritance is positively forbidden by the last clause of Rule 9, which excludes the right to inherit, as the representative of an illegitimate mother, any part of the estate of the latter's kindred, either lineal or collateral, and the right cannot, therefore, be traced beyond the mother, nor through the latter's lineal or collateral kindred. The law

breaks the connection at the mother in the ascending line, when it is necessary to pursue that in order to reach the *propositus,* and expressly prohibits any direct lineal or collateral descent but that mentioned in the first clause, namely, from the mother herself to the illegitimate child or the descendant of any such child deceased, and the descent provided for in Rule 10 as between illegitimates themselves and from them or their issue, as therein specially provided. Nor do we think that under Rule 10 the claim of the plaintiff is rendered any better. She comes within neither its letter nor its reason, and certainly not within the former. This canon declares that "illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all such children had been born in wedlock; provided, that when any legitimate child shall die without issue his inheritance shall vest in the mother in the same manner as provided in Rule 6 of this chapter. Code, chap. 28, sec. 1281. The illegitimates mentioned in the rule are those who are the children of the same mother, and they inherit as between themselves and their representatives, as if they were legitimate. We have no such case as this presented in the record. The plaintiff is not a sister of Austin Greenlee and therefore has not the same mother, but they are first cousins, being the descendants respectively of a brother and a sister. The second branch of the rule also refers to a descent as between brothers and sisters, and utterly excludes the idea that such a descent, as that the plaintiff now claims, was ever contemplated. The proviso to Rule 10 cannot of course affect the question involved herein. The plaintiff could not derive any title from Austin Greenlee through his mother, even if she had been living at his death, so as to take from him under

the proviso, when considered in connection with the proviso to Rule 6.

The plaintiff's counsel, however, strenuously insisted before us that it being admitted Adam Bettis, though illegitimate, was collaterally related to Austin Greenlee, also illegitimate, and there being no other nearer claimant than Malinda Avery, the stepchild of Austin Greenlee, or the child of his deceased widow, if Adam had been white and had survived Austin, he would have been his heir under Rule 10 of the Canons of Descent, giving to illegitimates the rights of legitimates as between themselves and their legal representatives, and the plaintiff consequently would inherit as heir of her deceased father. This was his principal contention, and in support of it he relied upon *Tucker v. Tucker,* 108 N. C., 238. A full and sufficient answer to the argument is that Rule 10 applies, by its very terms, to illegitimate children and is intended to affect only inheritances as between them and their representatives. This is clear from the words in the first part of the rule, "illegitimate children shall be legitimate as between themselves," and their estates shall descend "accordingly," and also from those we find in the latter part, when reference is being made to the death of any such illegitimate child or his issue, without leaving issue, and the descent of his estate to such person as would inherit namely, "if all such children had been born in wedlock," the said words evidently describing the children as a class who would inherit from each other, with the qualification as to the "issue" of such a child or the "representatives" of such children. The case of *Tucker v. Tucker,* instead of sustaining the contention of plaintiff's counsel, seems to us to be directly the other way. In that case the court decided that the Act of 1879 (Code, sec. 1281, Rule 13), provided for the inheritance of an illegitimate child from both parents instead of, as formerly, from its mother "and not collaterally," and then says: "Prior to that act, such children had

only the rights of other illegitimates, and, by section 1281, Rules 9 and 10, could only inherit from their mother, when there was no legitimate child, and from one another." And again it says: "By virtue of emancipation and the Constitution, the plaintiff has the same rights as any other illegitimates, and, under Rule 10, can succeed to the estate of his illegitimate brother."

In no view that we can take of the facts and the law, can the plaintiff recover. She cannot claim under the Act of 1866, and she does not present any facts which entitle her to claim under Rule 13, as she does not assert title derived directly from either of her parents. She can then only rely on Rule 9 or Rule 10. The reason just given why she cannot claim under Rule 13 applies with equal force to any claim under Rule 9, and, besides, she is not an illegitimate child, but has been made legitimate by the Acts of 1866 and 1879. As to Rule 10, she does not claim directly from a brother or sister, or from the issue or heirs of either, but from an illegitimate first cousin. *Sawyer v. Sawyer,* 28 N. C., at pp. 408, 409. It is well argued in the brief of the defendant's counsel that in *Tucker v. Bellamy,* 98 N. C., 31, it was decided there is no statute which enables a niece to inherit from a deceased aunt, who was a slave, and if that is so, how can a niece inherit from a descendant of such an aunt, unless there is some express provision to that effect. This is the plaintiff's case. It is true we should so construe these acts as to prevent an escheat, which is not favored by our system of laws and as it was the purpose to do so in passing them, but we must still give them a reasonable construction and decide according to their true meaning, regardless of the consequences. Besides, the defendant says there will be no escheat, as she is entitled to the land under Rule 8, being a child of the widow of the *propositus,* Austin Greenlee. We do not say how this is, as it is sufficient to hold that the plaintiff cannot recover. It makes no difference whether the defend-

ant has any title or not, for the plaintiff can succeed only on the strength of her own title as being good against the world or good against the defendant by estoppel. *Campbell v. Everhart,* at this term.

It may be that the plaintiff's claim should appeal most strongly to our sense of what is just and fair and also to our sympathy. If this be true, and we do not say that it is, as we cannot pass upon such matters, the law has declared against her, and what the law declares must stand for all that is right without question by us.

The court erred in its judgment, which is reversed, and the case is remanded with direction to enter a judgment, upon the facts agreed, for the defendant.

Reversed.

CRENSHAW v. STREET RAILWAY CO.

(Filed December 12, 1905).

New Trial—Newly Discovered Evidence—Practice.

Where a motion is made in this court for a new trial for newly discovered evidence, the court never discusses the facts on such motion, but simply awards or refuses a new trial.

ACTION by A. Crenshaw and Susan Crenshaw, his wife, against Asheville & Biltmore Street Railway & Transportation Co. and others, heard by *Judge Fred Moore* and a jury, at the March Term, 1905, of the Superior Court of BUNCOMBE. From a judgment for the *feme* plaintiff, the defendants appealed.

Moore & Rollins, Frank Carter and *H. C. Chedester* for the plaintiff.

Julius C. Martin for the defendant.

Per Curiam: Without any intimation as to the plaintiff's right to recover on the testimony as it now stands, the court is of opinion that a new trial should be awarded by reason of the newly discovered evidence, set out and referred to in the affidavits of the defendant, filed for the purpose on motion duly made.

Under the decision in *Herndon v. Railroad Co.,* 121 N. C., 498, we never discuss the facts on such motion, but simply award or refuse a new trial.

New Trial.

COMMISSIONERS v. ERWIN.

(Filed December 12, 1905).

Referee's Report—Exceptions.

If a party considers himself aggrieved by the rulings of the judge, on exceptions to the report of a referee, he should point out his objections by exceptions duly noted, and where the plaintiff filed a large number of exceptions to the referee's report and the judge confirms or modifies certain portions of the report and sets aside others, an exception, "The plaintiff excepts to such rulings adverse to it and appeals," is too general to be considered.

ACTION by Commissioners of Rutherford County against L. P. Erwin and others, to foreclose a tax certificate heard on exceptions to the report of a referee, by *Judge W. R. Allen* and a jury, at August Term, 1905, of Superior Court of RUTHERFORD. There was a judgment modifying and confirming the report, and on the report so modified, there was further judgment dismissing the action. Plaintiff excepted and appealed.

Solomon Gallert for the plaintiff.

McBrayer & McBrayer and *B. A. Justice* for the defendant.

HOKE, J., after stating the case: There is no objection properly noted in the case, which requires or permits this court to disturb the judgment of the court below, and the same is affirmed.

The only exception to the action of the judge on the report is in this language: "The plaintiff excepts to such rulings adverse to it and appeals." A general exception to the many rulings of the judge below on a report and judgment of the kind here presented, is contrary to the course and practice of the court and will not be considered. If a party litigant considers himself aggrieved by the rulings of a judge on exceptions to the report of a referee, he should point out his objections by exceptions duly noted, and as a rule only objections so indicated will be considered. Rule of Practice No. 27; Clark's Code, sec. 422 and notes; *Young v. Kennedy,* 95 N. C., 266; *Battle v. Mayo,* 102 N. C., 413; *McKinnon v. Morrison,* 104 N. C., 354.

In *Young v. Kennedy,* it is held that an exception to the report of a referee will not be considered where it is vague and indefinite and imposes on the court the necessity of an examination of the entire record to find out its meaning.

And in Rule 27, requiring objections to be noted by exceptions briefly stated and numbered, it is said that "No exception not thus set out or filed and made a part of the case or record, shall be considered by the court other than exceptions to the jurisdiction or because the complaint does not state a cause of action, or motion in arrest for the insufficiency of an indictment."

It may be that a judgment and report thereon could be so restricted in its nature that a single or general exception would note the only point in question; but not so here; and there could be no better illustration of the wisdom of the rule and the reasonableness of its requirement than in the case now before us. Here is a complaint containing twenty-three allegations as necessary to state the plaintiff's grievance; on

answer duly filed a reference is ordered; the referee, after taking quite an amount of testimony, makes an elaborate and carefully prepared report on the points in controversy; to this report the plaintiff files thirty-seven exceptions as to what the report does and a good number indicated by letters as to what it fails to do. The judge below gives the matter painstaking consideration, passes upon the questions of law and fact, confirms or modifies certain portions of the report, and sets aside others, in some instances substituting his own finding of fact for those modified or set aside. It is a full and well considered judgment, and the only notice of any objection to it is in the language of the exception above stated.

Under the law and rules of practice, such an exception will not be considered as raising any valid objection, and the judgment of the court below dismissing the action, is affirmed.

While we rest our decision on the form of the exception, there seems to be no error in the proceedings or judgment, which gives the plaintiff any just ground of complaint.

Affirmed.

AMMONS v. RAILROAD.

(Filed December 12, 1905).

Railroads—Expulsion—Punitive Damages.

In an action against a railroad for an alleged wrongful ejection, to entitle a passenger to punitive damages, his expulsion from the train must be attended by such circumstances as tend to show rudeness, insult, aggravating circumstances calculated to humiliate him.

ACTION by W. R. Ammons against Southern Railway Company, heard by *Judge G. S. Ferguson* and a jury, at the July-August Term, 1905, of the Superior Court of SWAIN.

This was an action for the recovery of damages, the plaintiff alleging that he was wrongfully ejected from the defendant's train. From the judgment rendered, the defendant appealed.

F. C. Fisher and *A. J. Franklin* for the plaintiff.

Moore & Rollins, W. B. Rodman and *A. B. Andrews, Jr.*, for the defendant.

BROWN, J. This case was before the court at the last term and the facts are fully stated, 138 N. C., 555. The case comes back upon one exception only by the defendant to the refusal of the judge to give the following instruction: "That in no aspect of the case can the plaintiff recover punitive damages." The court erred in refusing the instruction. Damages are classified generally as "compensatory" and "punitive." The latter are termed also vindictive or exemplary damages. Compensatory damages are defined by Joyce and other text writers as "those by which the actual loss sustained is measured and the injured party recompensed therefor." Joyce on Damages, sec. 26. Punitive damages are independent of the injury inflicted or the legal wrong com-

mitted, and are allowed in excess of simple compensation upon a theory of punishing the wrongdoer for the wrong inflicted, with the view to prevent similar wrongs in future. Where a trespass is committed deliberately in violation of plaintiff's rights, in a manner and under circumstances of aggravation and humiliation, showing a reckless and lawless disregard of the plaintiff's rights, the law allows damages beyond the strict measure of compensation by way of punishment. *Champion v. Vincent,* 20 Tex., 811; *Joyce, supra,* sec. 28, and notes.

The facts are, as testified to by the plaintiff, that he applied to the defendant's agent at Almond for a ticket to Noland. The agent said he did not have any and that "I could get on and he would speak to the conductor about it, and that the fare would be 40 cents. I rode down the road about a quarter of a mile and the conductor came to me and said he wanted a ticket, and I handed him 50 cents and said I wanted to go to Noland's Creek, and he looked at his book and said it would be 75 cents, and I asked him if he was not mistaken and he said 'No,' and I told him I would not pay 75 cents, and so he told me I would have to get off. I told him I had applied for a ticket and the agent said he didn't have any, and he said they did have tickets, and I told him I didn't know anything about it, only what they told me; that they told me they didn't have any tickets and the fare would be 40 cents, and he told me then I would have to get off. So I told him if he put me off I would sue the railroad company, and he pulled the cord and stopped the train and I walked out." Q. "What did he say in reply to you when you said you would sue the railroad company?" A. "He said he could not help that." Q. "Is that all he said?" A. "I believe that is all he said." Q. "Can't you remember what he did say when you said to him that you would sue the company?" A. "He said several words. I don't remember every word he said." Q. "Think if you know anything

else?" A. "I don't think of anything else." Q. "Where did he put you off?" A. "I got off by his instructions. He told me to get off." Q. "Where?" A. "About a quarter of a mile this side of Almond." Q. "How far is the station you wanted to go to from there?" A. "About 14 miles by rail." Q. "What were you doing at that time?" A. "I was working on Noland's creek." Q. "What were you getting a day?" A. "Dollar 25 cents." Q. "Did you put in a day's work?" A. "No, I walked in in the evening and went to work the next morning. I didn't hire anything, I walked. I just lost a day's work, is all." Q. "How much did you lose?" A. "The day." Q. "Is that all you recollect about this transaction?" A. "Yes, I believe it is."

To entitle a passenger to such damages, his wrongful expulsion from the train must be attended by such circumstances as tend to show rudeness, insult, "aggravating circumstances calculated to humiliate the passenger * * * " *Holmes v. Railroad,* 94 N. C., 318; *Rose v. Railroad,* 106 N. C., 170; *Knowles v. Railroad,* 102 N. C., 66. The subject of punitive and compensatory damages has been discussed in many cases in our own Reports. In the opinion in this case at the last term, *Mr. Justice Walker* called attention to some of the more important. The plaintiff's testimony fails to bring his case within the authority of any of these precedents so as to justify the awarding of punitive damages.

On the next trial of this case, it will be the duty of the trial judge to explain to the jury the meaning of, and difference between, punitive and compensatory damages, and to instruct them upon the plaintiff's own testimony, as herein set out, that he is entitled to compensatory damages only.

The findings upon the several issues are set aside and a new trial ordered.

New Trial.

HOKE, J., concurring: I concur in the decision awarding

a new trial and in the opinion which declares that the facts set out in the record disclose no case for the recovery of punitive or exemplary damages. There seems, however, to have been some misapprehension, on the trial below, as to the elements of damage involved in the two issues addressed to that question. These issues were: 7. What is the actual damage sustained? 8. What exemplary damages, if any, is plaintiff entitled to recover?

The court below and the parties litigant seem to have considered that the seventh issue, on actual damages, was confined to pecuniary loss, and that any recovery over and above this must be had, if at all, on the eighth issue, above set out. But this is not at all true. "Actual," in the sense of compensatory damages, is not restricted necessarily to the actual loss in time or money. The claimant may be confined to this, if the jury so determine, but more than this is contained in the term and more than this is covered by the issue. As said by *Clark, C. J.*, in *Osborn v. Leach,* 135 N. C., 628: Where the facts and nature of the action so warrant, "actual damages include pecuniary loss, physical pain and mental suffering," etc. And again: "Compensatory damages include all other damages than punitive, thus embracing not only special damage as direct pecuniary loss, but injury to feelings, mental anguish," etc., citing 18 Am. & Eng. Enc. (2 Ed.), 1082; Hale on Damages, pp. 99, 106. And this last author says: "It may be stated as a general rule in actions of tort, that whenever a wrong is committed which will support an action to recover some damages, compensation for mental suffering may also be recovered, if such suffering follows as a natural and proximate result." And so here, where a passenger is wrongfully ejected from a railroad train, the demand may be considered as one in tort, and, on an issue as to actual or compensatory damages, he may recover what the jury may decide to be a fair and just compensation for the injury, including his actual loss in time or

money, the physical inconvenience and mental suffering or humiliation endured, and which could be considered as a reasonable and probable result of the wrong done. *McNeill v. Railroad,* 135 N. C., 683; *Head v. Railroad,* 79 Ga., 358; Hale on Damages, *supra,* sec. 261. As said by *Bleckley, J.,* in *Head's case:* "Wounding a man's feelings is as much actual damage as breaking his limb. The difference is that one is internal and the other external; one mental, the other physical * * * At common law compensatory damages include, upon principle and, I think, upon authority, salve for wounded feelings, and our Code had no purpose to deny such damages where the common law allowed them."

Exemplary or punitive damages are not given with a view to compensation, but are under certain circumstances awarded in addition to compensation as a punishment to defendant and as a warning to other wrongdoers. They are not allowed as a matter of course, but only where there are some features of aggravation, as when the wrong is done wilfully and maliciously, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights. It is not necessary to submit this element of damage under a separate issue, but there is no objection to this course, and frequently it is desirable, as stated in the principal opinion, there are no circumstances of aggravation, shown in this evidence, which would justify an award of exemplary damages, but on the issue as to actual or compensatory damages, the jury under proper instructions should be directed to award what in their judgment is a fair compensation for the plaintiff's wrong under the principle here stated, and not confined to the actual loss in time or money as was done on the former trial.

CLARK, C. J., CONNOR and WALKER, JJ., concur in concurring opinion.

DIXON v. RAILROAD.

(Filed December 12, 1905).

Railroads—Crossings—Negligence—Evidence.

In an action against a railroad for damages for the alleged negligent killing of the plaintiff's intestate at a crossing where there was evidence to show that an engine of the defendant was backing at night toward a crossing near the depot and ran over and killed the intestate, who at the time was lawfully upon the track endeavoring to cross it going to his home; that the engine was running without lights or signal warnings and without any one stationed so as to keep a proper lookout, *held*, that these facts fix the defendant with the legal responsibility for intestate's death.

ACTION by Anderson Dixon, Administrator of Hezekiah Dixon, against Southern Railway Company, for the alleged negligent killing of the plaintiff's intestate, heard by *Judge T. A. McNeill* and a jury, at October Term, 1905, of Superior Court of BUNCOMBE.

There was evidence of the plaintiff tending to show that on the night of the 28th of August, 1904, in the town of Black Mountain, N. C., an engine of the defendant was backing towards the crossing near the depot and ran over and killed the intestate; that at the time of the killing the intestate was lawfully and rightfully upon the defendant's track, endeavoring to cross it, going to his home immediately south of the railroad; that the engine was running backward at the time without lights or signal warnings, and without anyone being stationed so as to keep a proper lookout. There was evidence of the defendant tending to contradict the plaintiff's testimony. Verdict and judgment for the plaintiff. Defendant excepted and appealed.

Tucker & Murphy for the plaintiff.
Moore & Rollins for the defendant.

Per Curiam: The jury have accepted the plaintiff's version of the occurrence, and these facts fix the defendant with the legal responsibility for intestate's death. The case is governed by the decision in *Reid v. Railroad,* at this term. We find no error which entitles the defendant to a new trial.

Affirmed.

STANALAND v. RABON.

(Filed December 12, 1905).

Processioning—Issue of Title—Practice.

1. Chapter 22 of the Acts 1893 was intended to simplify the procedure in processioning cases and to afford a speedy and effective method of determining the true location of disputed lines and boundaries of lands as between their proprietors instead of requiring them to resort to an action of ejectment.

2. In a proceeding under the processioning act, Acts 1893, chapter 22, where an issue of title was raised in the pleadings, the issue thus raised should have been transferred to the Superior Court for trial, and the court erred in dismissing the proceeding.

PROCEEDING by Thaddeus W. Stanaland and others against J. W. Rabon and others, heard by *Judge G. S. Ferguson,* at the March Term, 1905, of the Superior Court of BRUNSWICK.

The proceeding was commenced before the clerk to determine boundaries under the processioning act, Public Laws 1893, chap. 22. The defendants, J. W. Rabon and wife and F. M. Rabon, denied that the plaintiffs are the owners of the land described in the complaint and also denied that there is any dispute between the plaintiffs and the said defendants as to any boundary lines. Other allegations are also denied. The clerk, on the return day of the summons, after hearing the matter, entered judgment against all the

defendants, except J. W. Rabon and wife, and F. M. Rabon, directing the lines to be run, and appointing W. W. Drew surveyor for that purpose. The latter ran the lines, after due notice, and filed his report. On the 14th day of December, 1903, the clerk heard the case and by his judgment established the lines as against all the defendants except the defendants J. W. Rabon and wife, and F. M. Rabon. The judgment as to them was without prejudice. The clerk did not pass upon the contention as to title raised in their answer, but, upon their motion, transferred the issue so raised to the Civil Issue Docket. At the Fall Term, 1904, the court remanded the cause to the clerk to hear and determine the same and render judgment in full therein as to all the parties. No exception was taken to this order. On October 31, 1904, after notice, the clerk entered his judgment, as to all the parties, establishing the boundaries. To this judgment the defendants, J. W. Rabon and wife and F. M. Rabon, excepted and appealed. The cause came on to be heard at the April Term, 1905. The said defendants by their counsel, moved to dismiss the action as to them, because there was a distinct issue of title raised in the pleadings, which could not be determined in this proceeding, but only by an action of ejectment. The counsel for petitioners stated that he was ready for trial and if allowed by the court to go to trial, the petitioners would be ready to prove their title and possession.

The court granted the motion of the said defendants and dismissed the action, for the reason, as stated in the judgment, that a distinct issue of title is raised, which cannot be settled in this cause, but only in an action of ejectment. Petitioners excepted and appealed.

Iredell Meares and *Davis & Cranmer* for the plaintiffs.
John D. Bellamy for the defendants.

WALKER, J., after stating the case: It seems to us that the

question presented in this appeal is fully covered by the recent decision in *Smith v. Johnson,* 137 N. C., 43, and that case conclusively determines the matter herein involved against the contention of the defendant. The Act of 1893, chap. 22, was evidently intended to simplify the procedure in processioning cases and to afford a speedy and effective method of determining the true location of disputed lines and boundaries of lands as between their proprietors instead of requiring them to resort to the cumbersome, and sometimes intricate and costly remedy by suit to try the title, formerly an action of ejectment. Whether the Legislature has succeeded, as yet, in accomplishing this commendable purpose, is a question which naturally addresses itself to the consideration of that honorable body. But however that may be, it cannot be doubted that if, upon a mere denial of ownership or occupation, a defendant is entitled to have the proceeding dismissed, the whole object in passing the act may be utterly defeated. If the plaintiff alleges in his petition such facts as bring his case within the provisions of the act and these essential, or material allegations are denied, the issues thus raised should be transferred to the Superior Court for trial, just as is done in other cases of special proceedings. The act in terms requires this to be done. The issues thus raised are to be tried and the cause further proceeded in according to the manner pointed out in *Smith v. Johnson, supra.* That case had not been reported, perhaps, at the time of the trial of this cause in the court below, and we presume was not brought to the attention of the court. It is closely analagous to our case and indeed is substantially the same kind of case in its facts and in the principles involved. It must therefore govern our decision in the matter presented in this record. His Honor erred in dismissing the case. The judgment will be set aside and further proceedings will be had in accordance with the law and the course and practice of the court as herein indicated.

Error.

CRAWFORD v. MASTERS.

(Filed December 12, 1905).

Ejectment—Issues—Pleadings—Judgment.

1. An issue should be directed to the matter alleged on the one side and denied on the other. The judge may, in addition to the issue, submit questions to the jury pertinent to the matters in controversy, but he is not compelled to do so and his refusal is not reviewable.

2. In an action for the recovery of land if the defendant wishes to disclaim as to any portion of the *locus in quo* and put in issue the title to only a specific portion, he should do so in his answer.

3. In an action for the recovery of land the judgment must follow and conform to the verdict in designating the extent of the recovery, and must be rendered for the premises described in the complaint.

ACTION by F. P. Crawford against D. S. Masters, heard by *Judge T. A. McNeill* and a jury, at the February Term, 1905, of the Superior Court of McDOWELL.

This was an action for the recovery of the possession of a lot in the town of Marion. Plaintiff alleged that he was the owner of the lot and that defendant was in possession and wrongfully detained the same. Defendant denied each allegation of the complaint. Plaintiff introduced grant and several deeds for the purpose of showing title out of the State and that defendant and himself claimed under a common source. He introduced several deeds constituting his chain of title. The description of the lot in controversy, set out in the complaint, and the deed under which he claimed, is in the following words: "Also one other lot or parcel of land containing about three-fourths of an acre adjoining the above on the southwest, and is now enclosed with the above named town lot; for the courses and distance reference can be had to a deed from E. S. Hall to John Isbell, said lots

being sold by Benj. Weeks, administrator of John Isbell," etc. Plaintiff testified that he purchased the lot in controversy, together with adjoining lot, June 3, 1890, from J. S. Brown; that said Brown showed him the boundaries; that his son-in-law was there in possession; that both lots were enclosed as one by a rail fence—save a small part in front which was enclosed with a paling; that he had been in possession, etc., up to the time of bringing action. There was other testimony on behalf of plaintiff in regard to the fence. The defendant introduced a number of witnesses contradicting plaintiff's testimony in respect to the location of the fence. At the close of defendant's evidence, he admitted in open court, that he was in possession of the lot west of the new street. Defendant tendered the following issues: "1. Is the plaintiff the owner and entitled to the lands described in the complaint. 2nd. Where is the western boundary of the second lot described in the complaint? 3. Is the defendant in possession of any land to which plaintiff has shown title?" The court declined to submit the issues and in lieu thereof submitted the issue: "1. Is the plaintiff the owner and entitled to the possession of the lands described in the complaint? Ans. Yes." Defendant excepted. The parties introduced a map showing the respective contentions in regard to the boundary. The plaintiff introduced an agreement entered into between W. R. Whitson and W. S. Masters in regard to the measure of liability in the event of a breach of warranty, etc. Defendant excepted.

There was no exception to the charge, as given. Defendant submitted several prayers for special instructions, some of which were declined. The defendant moved for judgment upon the verdict, which was refused and he excepted.

He also excepted to the form of the judgment and appealed.

P. J. Sinclair for the plaintiff.
Justice & Pless for the defendant.

CONNOR, J., after stating the facts: The plaintiff alleged that he was the owner of the lot in controversy and that defendant was in the wrongful possession. Both these averments defendant denied. Pending the trial defendant admitted that he was in possession of that portion of the lot in respect to which there was a controversy. With this admission there was but one issue arising upon the pleadings —that of title. It is elementary that the issues should be directed to the matter alleged on the one side and denied on the other. If the judge, in his discretion, deems it proper, he may, in addition to the issues, submit questions to the jury pertinent to the matters in controversy, but he is not compelled to do so and his refusal is not reviewable. Clark's Code, sec. 393, and cases cited. In an action for the recovery of land if the defendant wishes to disclaim as to any portion of the *locus in quo* and put in issue the title to only a specific portion, he should do so in his answer. If he denies the title to the entire boundary and the issue is decided against him, the judgment will be signed in accordance with the allegation in the complaint, unless the jury shall by their verdict restrict the boundary of the recovery. Whatever may have been the rule in the action of ejectment, as it prevailed prior to the adoption of our Code of Procedure in regard to the form and effect of the judgment, it is well settled that in the civil action for the recovery of real estate, the judgment must follow and conform to the verdict in designating the extent of the recovery, and must be rendered for the premises described in the complaint. Sedg. & Wait, Trial Title, sec. 525.

In this record, the plaintiff alleged ownership of a lot, enclosed with another lot conveyed in the same deed. The boundaries were marked by a fence. There was a controversy as to the location of the fence. His Honor instructed the jury that the burden was on the plaintiff to establish, by a preponderance of the evidence, his claim and right of pos-

session up to the boundary contended for; that he must satisfy them as to the true location of his boundary and fence, set out in his deed, as well as his possession within the same; that if they found by the greater weight of the evidence that the fence was at the point contended for by the defendant (explaining by reference to the map the respective contentions), they should answer the issue "No." The finding upon the issue in view of the admission settled the matter in controversy, and entitled the plaintiff to judgment according to the description of the lot in his complaint. His Honor's charge was full and clear, both in respect to the subject matter of the litigation and the testimony bearing upon the respective contentions of the parties.

We have examined the instructions asked by the defendant and think that, in so far as they were correct propositions, they were given by the judge below. The agreement between Whitson and Masters, to the introduction of which the defendant objected, does not appear to us to have much, if any, bearing upon the issue. We cannot see how its admission prejudiced the defendant.

We have examined the entire record in the light of the defendant's exceptions and brief, and find no error. The case was fairly tried and the judgment was drawn in accordance with the pleadings and verdict.

No Error.

COOPER v. RAILROAD.

(Filed December 12, 1905).

Railroads—Crossings—Duty of Railroad and of Traveler—Contributory Negligence—Instructions — Evidence — Inventory—Annual Account.

1. Both the railroad when approaching a public crossing and the traveler on the highway are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty.

2. In an action for damages for the alleged negligent killing of plaintiff's intestate, an instruction that relieved the traveler of all obligation to look and listen when there had been a failure on the part of the defendant to give the ordinary signals, where there was evidence tending to show that there was an unobstructed view, is erroneous, and the fact that the court in other portions of the charge imposed on the plaintiff the obligation to look and listen whenever the view was unobstructed, does not help the matter.

3. Evidence tending to show that the intestate was in a covered wagon and that he drove on the crossing without any stop whatever and with the wagon cover down on the side from which the train approached and at a point just on the edge of the wagon road and 13 feet from the center of the railroad track one could see down the track from 500 to 1,200 feet, in the direction from which the trains approached, was sufficient for the consideration of the jury on the issue of contributory negligence.

4. A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty.

5. Where the view is unobstructed, a traveler, who attempts to cross a railroad track under ordinary and usual conditions without first looking, when, by doing so, he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence.

6. Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence.

7. There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether as when gates are open or signals given by a watchman and the traveler enters on the crossing reasonably relying upon the assurance of safety.

8. In an action to recover damages for the alleged negligent killing of plaintiff's intestate, plaintiff's inventory of the personal property of her intestate and her annual account as administratrix are inadmissible for the purpose of showing intestate's capacity to earn and accumulate money.

CLARK, C. J., and CONNOR, J., dissenting.

ACTION by Mary W. Cooper, Administratrix of W. A. Cooper, v. North Carolina Railroad Co., to recover damages for alleged negligent killing of plaintiff's intestate, heard by *Judge E. B. Jones* and a jury, at April Term, 1905, of the Superior Court of CASWELL.

The ordinary issues in such actions were submitted. There was evidence of plaintiff tending to show that intestate was killed in attempting to drive his wagon over defendant's road at a public crossing, and by reason of the negligent failure on the part of defendant in giving the ordinary and usual signals at crossings, and that such negligence was the proximate cause of the injury.

There was evidence of defendant tending to show that the ordinary and usual signals were given; and that the intestate was guilty of contributory negligence in driving on the crossing without having looked and listened for an approaching train; and when, if he had looked, the approach of the train

might have been seen in time to have avoided the collision and prevented the death of the intestate.

In response to prayer for instructions by plaintiff, the court on the issue as to contributory negligence, charged the jury as follows:

"4. It is the duty of a railroad company to give the public due notice of the approach of its trains to a public crossing so that travelers may stop their teams, if necessary, and stay off the crossing until the train has passed. The train, if it gives the proper warning of its approach, and the railroad company is not otherwise at fault, is entitled to the right of way in preference to a traveler on the highway. The traveler has the right to expect such warning to be given to him and he must look and listen when approaching a crossing, and his failure to look and listen when such warning is given is negligence, and if such failure should cause his death, no recovery could be had for it. But when the train does not give timely warning and reasonable warning of its coming, it is not contributory negligence in a traveler to go upon the track without looking and listening for the approach of a train, if he exercises that prudence and care which a prudent man would exercise under the circumstances and if the injury resulting is attributable to the negligence of the railroad company in failing to give the signals, for such failure would be deemed the proximate cause of the injury, if the jury should find from the evidence that with proper warning the traveler would not have attempted to cross. Therefore, if from the evidence you find that the railroad company failed to give timely warning of its approach to the crossing, by sounding the whistle or ringing the bell, and also find that the plaintiff's intestate went upon the crossing without looking and listening, his failure to look and listen under such circumstances would not be the proximate cause of his death if, with the proper warning, he would not have gone upon the track, and if from the evidence you find such to be the

facts, you will answer the second issue 'no,' that is that the plaintiff's intestate was not guilty of contributory negligence."

To this charge the defendant duly noted an exception. The court, in substance, repeated this statement in its direct charge to the jury. Verdict and judgment for the plaintiff; defendant excepted and appealed.

Kitchin & Carlton for the plaintiff.
Manly & Hendren for the defendant.

HOKE, J., after stating the case: The first portion of the instruction above quoted, which states the obligation on the railroad to give adequate warning when approaching a public crossing and the obligation on the traveler to look and listen in like case, is correct. As stated in *Improvement Co. v. Stead*, 95 U. S., 161: "Both parties are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty."

The remaining portion of the instruction, however, addressed more particularly to the feature of contributory negligence, by fair and reasonable intendment, can only mean that though a traveler in approaching a railroad track is required to look and listen, yet this obligation is not upon him, nor will the consequence be imputed to him, if he failed to look and listen when such failure was caused by the negligent failure of the railroad train to give the necessary signals; and this, where there was evidence tending to show that if he had looked he could have seen the approaching train in time to have avoided the collision, or at least to have saved himself by the exercise of reasonable effort. In this we think there was error which entitles the defendant to a new trial.

It relieves the traveler of all obligation to look and listen when there is failure on the part of the defendant to give

the usual and ordinary signals, and places the entire responsibility for such a collision on the railroad company. It would, in effect, practically eliminate the defense of contributory negligence when there had been a negligent failure to give the warning; for ordinarily it is only by looking and listening that a traveler can inform himself of dangerous conditions. This is not a just principle by which the rights of parties in cases like the present should be determined, nor is it supported by any well considered authority.

The general rule is well stated in Beach on Contributory Negligence, as follows: "In attempting to cross, the traveler must look and listen for signals, notice signs put up as warnings and look attentively up and down the track, and a failure to do so is contributory negligence which will bar a recovery. A multitude of decisions of all the courts enforce this reasonable rule. It is also consonant with right, reason and the dictates of ordinary prudence, and so much in line with the ordinary care which the average of mankind display in the daily routine of life, that it would seem to be scarcely dependent upon the authority of decided cases in the law courts. As a general rule the omission of the traveler to look and listen is so clearly a want of ordinary care that it constitutes contributory negligence as a matter of law, but it cannot be said that such failure will always defeat a recovery, for circumstances may and sometimes do exist which excuse the omission." And the rule so stated is in accord with the decisions in this and other jurisdictions. *Randall v. Railroad,* 104 N. C., 410; *Mayes v. Railroad,* 119 N. C., 758; *Mesic v. Railroad,* 120 N. C., 490; *Laverentz v. Railroad,* 56 Iowa, 689; *Nixon v. Railroad,* 84 Iowa, 331; *Davis v. Railroad,* 47 N. Y., 400; *Rodman v. Railroad,* 125 N. Y., 526; *Railroad v. Brownell,* 39 N. J. L., 189.

The rule is so just in itself and so generally enforced as controlling, that citation of authority is hardly required. But as the matter has been very earnesty debated, it is con-

sidered well to quote from some of the decisions illustrative of the obligation on the traveler to look and listen, and some of the exceptions where its violation was not held contributory negligence as a matter of law.

In *Randall's case, supra,* it is held to be the duty of a person approaching a railroad track to take every prudent precaution to avoid a collision, and it is the duty of the engineer to sound the whistle or ring the bell at a reasonable distance from the crossing in order to enable travelers to avoid danger.

In *Mayes' case* (*Clark, J.,* delivering the opinion,) it is held to be the duty of one approaching a railroad crossing to use ordinary and reasonable care to avoid accident, and to exercise his senses of hearing and sight to keep a lookout for an approaching train; and if he does not do so, but drives inattentively upon the track without keeping a lookout or listening for approaching trains, and injury results, he is ordinarily but not in all cases, guilty of contributory negligence.

In *Mesic's case, Mr. Justice Montgomery,* speaking for the court, said: "The rule is general and usual that whenever an approach to a public crossing over a railroad is made by anyone in charge of a wagon and team, such person is bound to look and listen for approaching trains and take every proper precaution to avoid a collision; and this is so even though the approach be made at a time when no regular train is expected to pass; and in case the driver fails to look and listen and to take proper precaution to avoid a collision, and one does occur, the plaintiff cannot recover, even though the defendant was negligent in the first instance.

In *Laverentz's case, supra,* it is held to be the rule that a person who voluntarily goes on a railroad track at a point where there is an unobstructed view of the track and fails to look or listen for danger, cannot recover for an injury which might have been avoided by so looking and listening; but when the view is obstructed or other facts exist which tend to complicate the question of contributory negligence, it becomes one for the jury.

In *Nixon's case, supra,* it is held that one, who in full possession of his senses and without having his attention diverted from any cause passes over a railroad crossing without looking in both directions to see if there is an approaching train, is guilty of contributory negligence and will not be entitled to recover for injuries received from a passing train, though no whistle was sounded nor bell rung from the engine as required by law. *Rothrock, J.,* delivering the opinion, said: "It is true there are exceptions to this rule. There may be such circumstances surrounding the traveler as that his failing to look and listen may exonerate him from the charge of contributory negligence. The traveler, for instance, may be placed without his fault, in some dilemma, or some place of danger, where the exigencies of the situation and an emergency may excuse him from going on the track without looking and listening. These circumstances are so varied that they cannot be cited or commented upon in an opinion without unduly extending the subject. They involve obstructions on the track, which prevent an approaching train from being seen by the traveler; and where there are several tracks and trains running on them in different directions, and one train is obscured by another, the fact that the railroad track is in a deep cut and trains cannot be seen by a traveler approaching the crossing, or trains following each other in close proximity, which may serve to confuse the traveler and numberless other circumstances from which the jury may be authorized in finding that the traveler exercised the precaution which an ordinarily prudent person would exercise under the same circumstances."

In *Rodman's case, supra,* it is held that a pedestrian, who crosses a railroad track, must, in the absence of circumstances excusing it, look in each direction and ascertain whether a train is approaching. He may not omit this in reliance upon the performance by the railroad of its duty to give reasonable notice of the approach of the train; and if he does

omit it, the neglect of the company to discharge its duty will not relieve him from the imputation of negligence. *Andrews, J.*, further said: "If in case of an accident at a crossing it appears that the person injured did look for an approaching train, it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time when and where looking would have been of some aid. Many circumstances might be shown which could properly be considered by the jury in determining whether he exercised due and reasonable care in making his observation; the presence of other imminent dangers, the raising of gates erected by the company to guard the highway, giving assurance that the crossing was safe; these and similar circumstances appearing, they may be considered in determining whether the person injured, who did in fact look and listen before attempting to cross the track, fairly discharge the duty imposed upon him, although it should appear that if he had looked at another instant of time, or had looked last in the direction from which the train was approaching, he would have seen it."

It will be observed that the circumstances which may at times excuse the failure of the traveler, who has entered on a railroad crossing, to note the approach of a train, usually arise where the view is obstructed, or in the presence of some imminent danger or emergency sufficient to divert the attention of a person of reasonable fortitude and self-possession, or where one has entered on the crossing under an express or implied invitation of the company's employees giving reasonable assurance of safety.

The last instance more usually occurs at stations where a way has been left open by the company across other tracks for an approach to the station or train, or at much frequented crossings where there are gates raised or an employee charged with the duty has satisfied the traveler that he may cross in safety, and has no application here.

The general rule is that the traveler is required to look and listen for danger, and where there is an unobstructed view he is not relieved of the obligation by the fact that the train has failed to give the ordinary signals of its approach.

The error in the above charge consists in relieving the plaintiff's intestate from all obligation to look and listen, if his not doing so was caused by the negligent failure of the defendant to give proper warnings, where there was evidence tending to show that there was an unobstructed view which would have enabled the intestate to see the train in time to have saved himself by the exercise of reasonable effort.

It is submitted in support of this charge that the objectionable feature is qualified or eliminated by the use of the words "if he exercised that prudence and care which a prudent man would use under the circumstances;" and further "that the failure to look would not be the proximate cause of the injury, if the jury should find from the evidence that with the proper warning the traveler would not have attempted to cross," and it is argued that by reason of these qualifying words, the charge may be referred to certain testimony to the effect that the view was obstructed. Unfortunately for this position, and for the intention here imputed to the judge below, he puts his own, and, as we interpret it, an entirely different construction upon these words, for in his conclusion and just after using them, he says: "Therefore if from the evidence you find that the railroad company failed to give timely warning of its approach to the crossing by sounding the whistle or ringing the bell; and also find that the intestate went upon the crossing without looking or listening, his failure to look and listen would not be the proximate cause of his death, if with the proper warning he would not have gone upon the track."

It is true the court in several other portions of the charge imposes on the plaintiff the obligation to look and listen whenever the view was unobstructed, but this does not help

the matter. Standing apart, the positions are in absolute conflict, and the only way to reconcile them and give each any significance would be to annex the erroneous proposition to the more correct one wherever the same occurs.

Again it is contended that the burden was on the defendant to establish contributory negligence; that there was no evidence tending to show contributory negligence sufficient for the consideration of a jury, and for this reason any error in the charge on that issue should be considered as harmless and immaterial. But this position cannot be sustained. Both the evidence on the conduct of the intestate and as to the physical conditions and placing of the occurrence are against it. There was evidence of the defendant tending to show that the intestate was in a covered wagon and that he drove on the crossing without any stop whatever, and with the wagon cover down on the side from which the train approached.

Henry Flintop, on pp. 38 and 39 of the record, testified that he "was in the wagon, going towards Scarlet crossing; while near a branch Cooper's wagon passed the witness and continued up the hill to the crossing; noticed the wagon of intestate nearing the railroad and wondered why they did not stop the team; Cooper was driving; the wagon sheet was down on the right side; the wagon did not slacken its speed or stop, but went right on the crossing; was looking at the wagon all the time."

There was also evidence to the effect that at a point just on the edge of the wagon road and thirteen feet from the center of the railroad track, one could see down the railroad from 500 to 1200 feet in the direction from which the train approached, and photographs were in evidence giving a picture of the view from that point. This was on the edge of the county road, and it may have been taken from that point in order to give the photographer an opportunity to present a picture of the county road where it approached the crossing, as well as the crossing itself. If the camera had been placed

in the center or right of the county road, the view down the railroad would have been shortened some, but would still be sufficient to require that the question should be submitted to the jury as to whether the intestate could, by looking, have noted the train's approach in time to have saved himself by reasonable effort, and with the obligation to look upon him.

There was both contradictory and impeaching testimony for the plaintiff on this question, but the defendant was entitled to have this view presented under a proper and correct charge.

We are further referred to several decisions in this State which, it is argued, are contrary to our present opinion, but none of them, we think, sustain the position for which they are cited. While the headnotes of the different cases may be at times too general, both these and the language of the judge delivering the opinion must be taken in connection with the facts admitted or established, or at least in evidence and assumed to be true, upon which they are predicated; and they are only to be regarded as authoritative decisions when so construed and applied.

Thus in *Hinkle's case,* the plaintiff testifies, on page 478, that the plaintiff and his father were on the county road in a covered wagon, and as they traveled along the road he looked out of the wagon two or three times to see if the train was coming; and when they had gone down the hill within about twenty yards of the crossing, he stopped the wagon and listened. The plaintiff then got on the cross pieces of the shaft and held to the wagon with one hand while he rested the other on the horse's rump, and, as his father drove on, he looked and listened, but neither saw nor heard an approaching train.

In *Alexander's case*, 112 N. C., 720, the view of the track was shut off by cars, etc., and the ordinary noise of the moving train was deadened by the operation of an adjacent cotton factory, etc. The plaintiff testified that before attempting

to cross the track he pulled up his horse and listened to hear if there was any approaching train, and, hearing no bell, he ventured on the track and was hurt; that he had heard the bell there, prior to that time, as a warning, etc. There was also an ordinance requiring trains to sound bells at crossings.

In *Russell's case,* 118 N. C., 1098, the evidence was not set out, but the writer has examined the records and finds that the plaintiff testified that he both looked and listened, and failed to see or hear any train, and drove on the track only after having done this. There was also testimony in this case to the effect that the plaintiff, who was in a buggy, had crossed one railroad track, and was between that and another which she was approaching, when the horse took fright, and her husband, who was driving, lost control over him; and, further, there were some crossties between the roads which may have partially obstructed the view. Here was testimony that the plaintiff both looked and listened; that the occupants of the buggy were in the presence of an emergency, and further there was evidence tending to show that the view was partially obstructed.

In *Norton's case,* 122 N. C., 910, the plaintiff stopped, looked and listened at a distance of sixty feet from the track, the nearest point where the view was open to him, and not seeing or hearing any train and relying on the signals he had a right to expect and which the defendant negligently failed to give, he drove on the track and was injured by a train running at an unlawful rate of speed. Here the plaintiff had looked at the only place where looking would have availed him.

In *Mesic's case, supra,* the distinction here dwelt upon is adverted to by *Mr. Justice Montgomery.* After laying down the obligation on the traveler to look and listen, even though the railroad may have been negligent, he proceeds: "The rule, however, does not prevail where to look would be useless on account of obstructions, natural in themselves, or such as had been placed by accident or design by the company's

employees on their tracks * * * and when at the same time the engineer had failed to sound the whistle or ring the bell for the crossing, and in consequence of which failure the plaintiff had been induced to go upon the track and take the risk."

In none of these cases cited and relied upon is the person injured or killed relieved of the obligation to look and listen when the proper and prudent exercise of sight or hearing would have enabled him to save himself by avoiding a collision, and a correct deduction from these and the other cases seems to be.:

(1) That a traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty.

(2) That where the view is unobstructed, a traveler, who attempts to cross a railroad track under ordinary and usual conditions without first looking, when, by doing so, he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence.

(3) That where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence.

(4) There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether, as when gates are open or signals given by watchman, and the traveler enters on the crossing reasonably relying upon the assurance of safety.

None of these positions, however, justify the charge given in the case, which as stated, withdraws all obligation either to look or listen when there has been a negligent failure to give the ordinary warnings, even though there was evidence tending to show there was an unobstructed view.

There was also pressed upon our attention a ruling of the court on a question of evidence, and as the cause goes back for a new trial, we deem it well to determine the matter.

Defendant offered exhibit A, being the plaintiff's inventory of the personal property of the deceased, and exhibit B, being the annual account of plaintiff, as administratrix of the intestate, for the purpose of showing the intestate's capacity to earn and accumulate money. The proposed evidence was excluded by the court and defendant excepted. If these papers should show a large estate, there are so many ways by which it could be explained otherwise than by the capacity of the deceased to accumulate money, and if it is small, there are so many and various ways it could be accounted for, consistent with the highest capacity to earn and acquire, that these admissions, we think, would tend rather to confuse than aid the investigation, and would open up a field of inquiry entirely too extensive and often foreign to the issue. We hold the papers to be irrelevant, and affirm the ruling of the trial judge on that question.

For the error in the charge above pointed out there will be a new trial on all the issues and it is so ordered.

New Trial.

CLARK, C. J., dissenting: In the first part of the fourth instruction given for the plaintiff, the court charged upon the issue of contributory negligence that the traveler "must look and listen when approaching a crossing, and his failure to look and listen when such warning (by the railroad) is given is negligence, and if such failure should cause his death, no recovery could be had for it." The court then added: "But

when the train does not give timely and reasonable warning of its coming, it is not contributory negligence in a traveler to go upon the track without looking and listening for the approach of a train, if he *exercises* that prudence and care which a *prudent man* would under the circumstances, and if the injury resulting is attributable to the negligence of the railroad company in failing to give the signals, such failure would be deemed the proximate cause of the injury, *if the jury should find from the evidence that with the proper warning the traveler would not have attempted to cross.*" This does not withdraw from the jury the duty of the traveler to look and listen, but simply leaves it to the jury to find, upon the facts of this case, whether the proximate cause of the injury was the failure of the deceased to look and listen, or was it attributable to the failure of the engineer to give a warning signal.

Every instruction must be taken in connection with the context and the evidence in the case. Here, in this fourth instruction, the judge expressly told the jury that one "must look and listen when approaching a crossing;" and further, he charged them in response to the fourth request of the defendant, that if the defendant failed to give a signal on approaching the crossing, this did not relieve the plaintiff's intestate of his duty to exercise the senses of sight and hearing and to take reasonable precautions to avoid accidents," and that if he did so fail to use his senses, the jury should find the issue of contributory negligence "yes," notwithstanding the negligence of the defendant in failing to give the signal. This is elaborated and more fully given in response to the defendant's prayers 5, 6, 7, 8, 9, 10 and 14, which are as clear and as strong as the defendant's counsel asked or could ask, and in substance that instruction was given to the jury no less than ten times in the charge or in the prayers given at the request of the defendant.

It is clear not only that the judge did not eliminate the

duty of the intestate to look and listen, but that there being occasions when the failure to look and listen could not contribute to the injury, as when if he had looked he could not have seen, and if he had listened he could not have heard, the judge in the above selected paragraph of the plaintiff's fourth prayer was simply submitting to the jury (as he should have done) the question of proximate cause, whether on the facts of this case, if the deceased did not look and listen it contributed to the injury, or was such injury caused by the defendant's failure to sound the whistle or ring the bell.

The evidence was that the county road crossed the railroad where the cut was 18 to 20 feet deep. Necessarily there was a bluff which would cut off the view of the approaching train from a wagon in the road. The engineer testified that he was running 40 to 50 miles an hour. He further said: "When I was 100 yards away I could not see the mules or the county road," and that he was only 40 or 50 yards away when he did see them. Of course if the engineer, sitting several feet above the track, could not see the mules when 100 yards away and did not see them till 40 or 50 yards away, the deceased who was in the wagon, down in the road and several feet behind the mules, could not see the engine that far off by reason of the same bluff. The court, therefore, properly told the jury that if the train did not give timely warning "it is not contributory negligence in a traveler to go upon the track without looking and listening, if he exercises that *prudence and care which a prudent man would exercise under the circumstances.*" He had told them that prudence required the traveler ordinarily to look and listen, but in this case, upon the engineer's evidence, if the intestate had looked he could not have seen, and upon the weight of the evidence, if he had listened he could not have heard, for eleven witnesses who were in position to hear it, testified that no signal was given, and the court was favorable to the defendant in requiring that the intestate should in all cases "exercise that prudence

and care which a prudent man would exercise under the circumstances.

It is true a photograph is sent up in the record by the defendant, and the photographer, witness for defendant, testified that at the point where it was taken the train could be seen 1,000 feet away. But on cross-examination he says: "I did not take a picture * * * from a point where a man would be crossing the track of the road. I was 13 feet from the center of the railroad track in the *outer edge* of the public road." Why was it taken there and not in the public road where the intestate must have been sitting in his wagon when the heads of his mules were at the track? The engineer's testimony and a glance at the photograph will show the reason. In the road, where the intestate was, the bluff hid him so that even his mules could not be seen by the engineer 100 yards away, and hence he could not see the engineer, whereas on the outer edge of the public road, the angle of vision not being cut off by the bluff, would perhaps permit a view down the railroad track for 1,000 feet. The evidence shows that the public road was 18 feet wide. The deceased, sitting on the right hand side of the wagon, could not see through the bluff, but the photographer, on the left hand outer edge of that road, could see down the track.

The charge was as favorable as possible to the defendant. In *Mayes v. Railroad,* 119 N. C., 770, it is said: "It is not negligence in a traveler to cross a track unless he disregards a warning in crossing which he might have seen or heard with proper care." In *Russell v. Railroad,* 118 N. C., 1109, it is said: "The plaintiff had a right to expect that the company would not omit to give the usual alarm, and was not culpable for acting upon that supposition."

"It is the duty of a railroad company to give reasonable and proper warning for the protection of travelers on the highway, when its trains are approaching a highway crossing, and a *traveler has a right to presume that this duty will be*

performed and reasonable warning given." 8 Am. & Eng. Enc. (2 Ed.), 408, citing *Railroad v. Cody,* 166 U. S., 606, and numerous other cases. Where the view is obstructed "the duty of the company to give notice is more imperative than at other places along its route." *Ibid.*, and cases there cited in note 4. The omission to do this "is negligence *per se*," *ibid.*, 416; and "the question whether the failure to ring a bell or sound a whistle was the cause of the injury sustained is a question of fact for the determination of the jury." *Ibid.*, 417, and numerous cases cited in note 1. This was the identical question which the judge submitted to the jury in the part of the fourth instruction given for the plaintiff, which is here objected to. "Failure to stop, look and listen is not contributory negligence *per se*," and is not negligence at all when the traveler could not have seen or heard. 7 Am. & Eng. Enc. (2 Ed.), 432 and 433, with citation of numerous authorities.

The judge in substance told the jury that it was the duty of the defendant to ring the bell or sound the whistle for the crossing, but that if the engineer failed to do so, this would not absolve the traveler from the duty of looking and listening, and if the intestate failed to do so it would be contributory negligence, unless they found that in fact the failure to look and listen could not contribute to the injury. That was correct, certainly in this case where, if the intestate had looked, the bluff would have prevented his seeing, and if he had listened he could not have heard a signal which it was testified by many was not given. The court further charged that in all cases one crossing a railroad track is required to use "that prudence and care which a prudent man would exercise under the circumstances," and there was evidence that the intestate did stop his wagon, and presumably he looked and listened. Only one witness, a colored man, testified that he did not stop, and five respectable men testified that such witness was not there on that occasion, and neither

he (nor any other) testified that the deceased did not look and listen. The judge left the question of proximate cause fairly to the jury and I see no error of which the defendant has any cause to complain. *Hinkle v. Railroad,* 109 N. C., 473; *Alexander v. Railroad,* 112 N. C., 720; *Russell v. Railroad,* 118 N. C., 1108; *Mayes v. Railroad,* 119 N. C., 758; *Mesic v. Railroad,* 120 N. C., 491; *Norton v. Railroad,* 122 N. C., 935. *Hinkle's, Russell's* and *Mayes' cases* all say that the traveler is not guilty of contributory negligence if his going upon the track is induced by the negligence of the defendant.

But suppose the jury believed Plintoff, he does not undertake to say that the intestate did not look and listen, but says that the wagon did not slacken its speed or stop. If true, was the failure to stop sufficient for the jury to reasonably infer that the intestate did not use due care and that such failure to stop was the proximate cause of his death, when no warning was given? His Honor certainly could not properly have instructed the jury to return an affirmative answer to the issue of contributory negligence.

But the defendant assumes that the intestate failed to look when at a distance of 13 feet from the track, and insists that such failure was the proximate cause of the injury. This contention of the defendant was clearly stated by His Honor in giving the defendant's instructions, and was found against the defendant. The evidence does not show that the intestate, when 13 feet from the track, could have seen the train. The evidence does not show that when the intestate was 13 feet from the track the train was 1,000 feet from the crossing. The evidence does not show that the intestate failed to look, and the evidence does not show that after the intestate could have seen the train the accident could have been avoided. On the contrary, the evidence shows that when the intestate could have seen up the track, his mules must have been partly on the track, and that at that time the train was in 50 yards

of the crossing running nearly a mile a minute. The evidence does not show what the mules did, but they escaped, while the wagon was demolished, the engine striking its front wheels. An occupant of a wagon is about 10 feet behind the heads of his team, so that when he is within 10 feet or even within 13 feet of the center of the track, his mules are in the act of crossing it. It would seem unreasonable to hold that, as matter of law, a traveler, whose team is in the act of crossing with a fast train already within 50 yards of him, when he could first see it, even if no excitement seized him or his mules in this sudden danger, had the opportunity thereafter and could be reasonably expected to avoid a collision.

In view of the great increase of the country in population and wealth, with the consequent vast increase of traffic, both upon the public roads which are the inheritance of the people and also upon the railroads operated by corporations which are under very slight regulation by the public, the number of people killed or maimed at the crossing of public roads on the same grade by railroads running at a speed formerly unknown, now mount up into many thousands annually in this country. Throughout Europe, except perhaps in Russia, no railroad is permitted to cross a public road on the same grade, but must either pass under or over the public road. This avoids the vast and deplorable loss of life which occurs in this country at such crossings, and similar statutes will doubtless be enacted at no distant day in this country, when such cases as the present will cease to come before the courts. In New York, years ago, such statute was enacted, applying, however, only to crossings to be laid out thereafter. In Connecticut, a statute was enacted forbidding any grade crossing whatever, and requiring all railroads within a specified time to change all crossings, so that their tracks should pass under or over the public roads. This act was held constitutional by the U. S. Supreme Court, affirming the Supreme Court of

Connecticut, even as to existing crossings (*Railroad v. Bristol,* 151 U. S., 556), on the ground that grade crossings were a menace to public safety, and it was further held that the imposition of the entire expense of such change of grade upon the railroad company was not in violation of the Constitution of the United States. This has been cited and followed in *R. R. v. Kentucky,* 161 U. S., 696; *R. R. v. Defiance,* 167 U. S., 99; *Wheeler v. R. R.,* 178 U. S., 324; *R. R. v. McKeon,* 189 U. S., 509; *R. R. v. Wheeler,* 72 Conn., 488; *Norwood v. R. R.,* 161 Mass., 265; *Chicago v. Jackson,* 196 Ill., 502. A due regard for the safety of life and limb of our citizens who may have occasion to use the public roads, will doubtless cause the statutes in this respect, enacted in New York and Connecticut, to be followed and enacted in other States, or at least will cause enactments conferring power upon the Corporation Commission to compel railroad companies to abolish grade crossings, or erect gates provided with keeper, wherever the public safety and the volume of travel on the public roads may require it. In Germany, the wheel of the engine at a prescribed distance completes an electric circuit, and automatically rings a gong annunciator in the station. The same device applied to grade crossings would save thousands of lives annually in this country. If it were not cheaper for the railroads to pay the damages assessed for the lives and limbs destroyed at such crossings, their own pecuniary interests would require them to make such changes of grade at all public crossings, especially at those most used, without awaiting the legislation that shall require them to do so.

CONNOR, J., dissenting: Conceding the force of the view presented in the opinion of *Mr. Justice Hoke,* I think that, considered as a whole, every question of law applicable to the evidence was presented to the jury in the charge. His Honor said to the jury that "the traveler has the right to expect such warning to be given to him and he must look and

listen when approaching a crossing, and his failure to look and listen when such warning is given is negligence, and if such failure should cause his death, no recovery could be had for it." He then stated the proposition in a negative form; "but when the train does not give timely and reasonable warning of its approach, it is not contributory negligence in a traveler to go upon the track without looking and listening for the approach of the train, if he exercises that prudence and care which a prudent man would exercise under the circumstances," etc. I think that with this language construed in the light of other portions of the charge favorable to, and given in, the words of the defendant's prayer, the jury could not have been misled in regard to the relative duty of the plaintiff's intestate and the defendant. Upon this view and for the reasons and authorities cited in the opinion of the *Chief Justice,* I concur in the dissenting opinion that there is no reversible error. I do not care to express any opinion in regard to the weight of the testimony; nor do I think that the other questions discussed are presented by the record. They are not "matters of law or legal inference," and I do not care to express any opinion in regard to them.

MILLHISER v. LEATHERWOOD.

(Filed December 12, 1905).

Nonsuit—Practice—Evidence.

1. Where a plaintiff, in deference to an adverse intimation of the court, submits to a nonsuit, he is entitled in this court to the most favorable interpretation of the evidence, after excluding all that is against him.

2. Evidence that the plaintiffs held a claim against M, which was sent to the defendant, as their attorney, for collection; that M held claims against L secured by liens on L's property and that the defendant also was L's attorney; that it was agreed between the defendant as plaintiffs' attorney, and M, that if M would release the liens, the defendant would assume the payment of plaintiffs' claim against M, he stating that L, his client, had placed the money in bank to his credit for this purpose, and that the plaintiffs' account was not paid, *held*, that the court erred in deciding as a matter of law that the plaintiffs were not entitled to recover of the defendant the amount of their claim against M.

BROWN, J., dissents.

ACTION by M. Millhiser and Company against R. L. Leatherwood, heard by *Judge Thos. J. Shaw* and a jury, at the Spring Term, 1905, of the Superior Court of SWAIN.

This action was brought to recover the sum of $647, which it is alleged the defendant received on a claim he held for collection as attorney for the plaintiffs, and which, upon demand, he has failed to pay over. This allegation is denied in the answer. The evidence tended to show that the plaintiffs had sold and delivered goods to Marr & Co. to the amount of $1,000. They paid $230 and the account, then amounting to $730, was sent by plaintiffs to defendant as their attorney for collection. Coffin & McDonald owned and operated a mill and had contracted with one W. W. Ladd to saw logs for him. Coffin & McDonald failed to pay their hands and

Marr & Co. advanced the money, at their request, to the hands and took an assignment of the claims of the hands against Coffin & McDonald, and filed liens upon lumber which belonged to Ladd. The defendant also represented Ladd as attorney. It was agreed between the defendant, as plaintiffs' attorney, and W. T. Conley, acting for Marr & Co., that if Conley would release the liens and take down the notices of sale, which had been posted on the lumber piles, the defendant would assume the payment of the account of the plaintiffs against Marr & Co., he stating at the time that Ladd, his client, had placed the money in the bank to his credit in order to pay the amount secured by the liens and discharge the same, and that he would pay the amount for which liens were filed out of this money. W. T. Conley, a witness for the plaintiff, in this connection, testified: "Defendant said that if I would take notices of sale off the lumber, so that he could load it, he would pay the Millhiser debt to the amount of the notices taken off. The debt amounted to $630 and the liens to $700." The witness further testified: "I told him the Millhiser debt was what I wanted to be paid, and that I would go on and take the liens off if he would apply the money to the Millhiser debt, and I then went and helped to take the notices of sale off the lumber, and it was then loaded and shipped away. Ladd had Noble to load the lumber. Leatherwood said he would pay the amount to Millhiser & Co. instead of paying it to me, as he held the claim against me, and I agreed to this. The next morning I went to the defendant to get a receipt, and he said that he was busy right then, and would give a receipt just as soon as the lumber was loaded." About two weeks afterwards, Conley saw the defendant, who told him that some of the checks he had drawn on the fund in bank, had been returned protested, as they had drawn the money out before his checks were presented. Conley then asked defendant for a receipt for the claim of Millhiser &

Co. against Marr & Co., and he replied that he would rather wait until he collected the money out of them. Defendant paid some of the lienors, but stopped paying when the money had been drawn from the bank.

Sheriff Teague (who held the execution for the sale of the lumber, issued in the proceedings to enforce the liens) testified that the defendant requested him to postpone the sale, stating at the time that the money to satisfy the liens would be sent to the bank and might be there that day. The sheriff refused to postpone the sale, when defendant told him if he would go to Asheville with him to see about the money, he would pay his expenses. They went and saw Rankin, the bank's cashier. They inquired of him if any money was there for the defendant and he said there was not. Defendant then said: "We will go to dinner and come back." They returned to the bank after dinner and the cashier told them that the bank had been wired to put $1,000 to defendant's credit. The sheriff then wired his deputy to postpone the sale. The witness Teague further testified: "The next day the defendant gave me a check for the liens. I sent the check to the bank and Rankin told me defendant had no funds to meet the check, as Stewart had wired the money out of Leatherwood's hands, or countermanded his order. Defendant said this money was to pay off the liens. After refreshing my recollection, I remember that the defendant told Conley he would receipt him for the Millhiser debt if he would release the liens." There was other testimony corroborating that already stated. The defendant testified in his own behalf that he thought the $1,000 was in the bank when he gave his check to Sheriff Teague for $142. Rankin told him, not that the money was in the bank to his credit, but that the bank had received a telegram to put $1,000 to his credit, and that the order to do so was immediately countermanded. He stopped shipping lumber and was not afterwards notified that any money had been placed to his credit.

Defendant then testified: "I never told Conley that I would give him a receipt for the Millhiser claim till money was placed to my credit. If there was any conversation about the receipt, I don't remember it. I owed Marr & Co. an account, and I might have agreed to credit it on the Millhiser matter and give him a receipt, but I didn't do it." He further testified that he did not tell anyone that he had $1,000 in the bank. If anything was said about it by him, it was when he returned from Asheville and repeated what Rankin had told him. The other material portions of the plaintiff's evidence were denied. The witness Rankin testified that the bank had received a telegram to pay defendant $1,000, but that in about an hour the request had been withdrawn, and that he had no time to place the amount to the credit of defendant and that he had never notified him of it. No such amount was ever placed to his credit. He had searched for the telegrams, but could not find them, and thought they were burned. The order authorized the bank to draw for $1,000 and place that amount to defendant's credit. He also said that he did not recollect telling Teague what the latter stated he had said to him at the bank about defendant having a credit there of $1,000.

At the close of the plaintiff's testimony, the defendant moved for a judgment of nonsuit under the statute, which the court refused, and at the close of all the testimony he renewed the motion. The court sustained it and entered judgment of nonsuit. Plaintiffs excepted and appealed.

Fry & Rowe for the plaintiffs.
No counsel for the defendant.

WALKER, J., after stating the facts: A judgment of nonsuit requires us to assume that all the evidence which tends to establish the plaintiff's case is true, and to view it in the aspect most favorable to the plaintiff, drawing every reason-

able and legitimate inference therefrom which the jury could have drawn had they passed upon the case. All the facts that make for the plaintiff must be taken as established and considered by us, and all those that make against them must be rejected. In a few words, they are entitled in this court to the most favorable interpretation of the evidence, after excluding all that is against them. *Springs v. Schenck,* 99 N. C., 551; *Purnell v. Railroad,* 122 N. C., 832; *Printing Co. v. Raleigh,* 126 N. C., 516. In *Brittain v. Westhall,* 135 N. C., 495, the principle was thus formulated: "It is well settled that on a motion to nonsuit or to dismiss under the statute, which is like a demurrer to evidence, the court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true and construed in the light most favorable to the plaintiff, and every fact which it tends to prove, must be taken as established, as the jury, if the case had been submitted to them, might have found those facts upon the testimony." It was said in *Avery v. Stewart,* 136 N. C., 430: "The right of the plaintiff to have (the case) submitted to the jury cannot be denied or abridged, provided there is some evidence tending to establish the plaintiff's contention." The same principle applies with equal force when a plaintiff, in deference to an adverse intimation of the court, submits to a nonsuit. *Gibbs v. Lyon,* 95 N. C., 146; *Springs v. Schenck, supra; Abernathy v. Stowe,* 92 N. C., 213. The court declares in the case last cited that the plaintiff is entitled to go to the jury if in any view of the evidence he has made out a *prima facie* case. The question as to what is evidence fit to be considered by the jury was discussed by us in *Byrd v. Express Co.,* and *Campbell v. Everhart,* at this term.

We will now proceed to examine this case in the light of this well settled rule. If the first ruling made by the court was right, that is, the refusal to nonsuit the plaintiff at the close of his testimony, then the second ruling was wrong, as

none of the evidence afterwards introduced could be considered against the plaintiff, but only such as was in his favor. But we pass by the first ruling, as it was eliminated when the defendant introduced testimony, and we are now confined to the second ruling dismissing the action at the close of all the testimony. It appears that the plaintiffs sued Marr & Co. for the recovery of the debt due to them and obtained judgment. Defendants appealed to this court and it was held here that the transaction between Marr & Co., the bank and Leatherwood, constituted a payment of the plaintiff's claim and a new trial was awarded. *Millhiser v. Marr,* 128 N. C., 318. The case was again tried below when the defendant got a judgment and the plaintiff appealed. Upon testimony substantially identical with that we have before us, this court held that there was evidence for the consideration of the jury upon the plea of payment, and that the only question involved was one of fact, whether the money had been placed in the bank to Leatherwood's credit, and, the jury having found with the defendant, the judgment was affirmed. *Millhiser v. Marr,* 130 N. C., 510. Leatherwood is certainly not bound by either of those decisions, under the doctrine of *res judicata,* for they cannot have that force and effect as to him, he not having been a party to the action. But if we are to follow those cases, as precedents, there is no way of avoiding the conclusion that His Honor erred in the trial of this cause, when he withdrew the case from the jury and decided as a matter of law that the plaintiff was not entitled to recover, in any view of the evidence. In the first of the decisions of this court to which we have referred, it is said: "In what way Ladd drew the money out of the bank does not appear, but it does not concern defendants. Under their agreement with Leatherwood, who had it in bank to his credit, it had been appropriated for the payment of plaintiff's debt, and if by negligence or otherwise upon the part of the attorney or the bank, Ladd got hold of the money,

plaintiff must look to them and not to defendants. Plaintiffs were acting through their agent, having placed in him authority and trust, and are bound by his acts in dealing with defendants. In no sense was he the agent of the defendant, and they lost all control over, right to and responsibility for the money when he agreed to and did accept it in payment of his client's debt." 128 N. C., at p. 321. And in the second of the decisions the court says: "His Honor committed no error in holding, at the close of the evidence, that all there was in the case was whether or not the $1,000 had been placed in the bank to the credit of Leatherwood to pay off the liens. There is no suggestion that Leatherwood misapplied the fund, but it is admitted that he did not do so. Under the decision of this court (*Millhiser v. Marr,* 128 N. C., 318), it is held that plaintiffs' debt against defendants was settled when W. T. Conley released his lien and agreed that his money in Leatherwood's hands should be applied to that purpose." 130 N. C., at p. 512. Without discussing or deciding the question as to the liability of the defendant, we simply hold that there was evidence for the jury upon the issue raised by the pleadings. We prefer not to intimate any opinion at the present stage of the case as to the liability of the defendant, nor until we have a finding of the jury upon the facts. They may find against the plaintiff, and it may not therefore become necessary ever to decide that question, and if they find for the plaintiff, we do not now know exactly how the matter will be presented, if there is an appeal. We fully concur in what is said by the court in *Millhiser v. Marr,* 130 N. C., 512, namely, that there is no suggestion, and we add, no evidence that Leatherwood ever misapplied the fund or any part of it, nor indeed that he ever had it in his actual possession. His liability must depend upon facts, from which it will appear that he has derived no personal benefit from the transaction.

There are other exceptions in the case, but it is not neces-

sary to consider them, as the decision upon the matter discussed is sufficient to dispose of the appeal and the other questions may not again be presented. We will suggest, however, that if the plaintiffs expect to recover upon any other ground than that stated in the complaint, for example, upon the ground of negligence, they must amend their pleading. They can recover, if at all, only according to the allegations of their complaint. *Faulk v. Thornton,* 108 N. C., 314.

There was error in the ruling of the court. The nonsuit will be set aside and a new trial awarded.

Error.

BROWN, J., dissenting: I am impelled to dissent from the opinion and conclusion in this case. 1. The allegations of the complaint are to the effect that the defendant received the money for his client, and the action is evidently brought to recover the money so had and received. There is no evidence that the defendant ever received the money or anything else in payment of the debt.

2. If the defendant is to be charged with negligently releasing the lien on the lumber, which it is claimed he held for his client's benefit, that would involve a radical amendment to the pleadings and practically a change in the cause of action. As no amendment was asked for in the Superior Court or in this court, I think the judgment should be affirmed.

CORPORATION COMMISSION v. RAILROAD—"INDUSTRIAL SIDING CASE."

(Filed December 12, 1905).

Corporation Commission, Powers of—Sidetracks to Industries—Reasonableness of Order—Evidence.

1. Under sub-head 15 of section 2, chapter 164, Laws 1899, authorizing the Corporation Commission to require the construction of sidetracks to industries when the revenue accruing from such sidetrack is sufficient within five years to pay the expenses of its construction, an order requiring the railroad to construct a spur siding for the use of a lumber plant to hold four cars, about one and a quarter miles from a station, is not unreasonable, where it appears that the lumber shipped from said siding in two years would yield a revenue of $6,000.00 to the railroad, and the cost to the defendant of constructing it (the grading and crossties being furnished by the lumber company) would be about $200.00.

2. Evidence that the plaintiff was permitted to show that a few years ago the defendant maintained a sidetrack at this same spot for two years without any inconvenience or accident, was competent to show the practicability of a sidetrack being established at this point.

BROWN, J., dissenting.

ACTION by State *ex. rel.* North Carolina Corporation Commission, upon petition of the Round Pine Lumber Co., against the Seaboard Air Line Railway, heard by *Judge M. H. Justice* and a jury, on appeal from order of the commission, at the September Term, 1905, of the Superior Court of WAKE. From a verdict and judgment thereon, the defendant appealed.

H. E. Norris and *Seawell & McIver* for the plaintiff.
T. B. Womack and *Pou & Fuller* for the defendant.

CLARK, C. J. The Corporation Commission Act, Laws 1899, chapter 164, section 2, enumerates in twenty-six sub-

heads the powers conferred upon the Corporation Commission. Among these, sub-section 15 authorizes the commission, "To require the construction of sidetracks by any railroad company to industries already established or to be established, provided it is shown that the proportion of such revenue accruing to such sidetrack is sufficient within five years to pay the expense of its construction," and further restricting the power by forbidding the commission to require the construction of any sidetrack more than 500 feet.

The power of the General Assembly to establish a commission to supervise and regulate the rates and operations of *quasi-public* corporations exercising public franchises has been too often decided in the State and Federal Supreme Courts to be again discussed. The matter has been discussed, with the citation of authorities, *Railroad Connection case,* 137 N. C., 14 *et seq.; Corporation Commission v. Railroad (Rate case),* 127 N. C., 283; *Express Co. v. Railroad,* 111 N. C., 463, and in many others, among them *Corporation Commission v. Railroad ("Track Scales case")*, at this term.

As to this special matter, which arises under sub-head 15, authorizing the commission to require the establishment of sidetracks for the use of industrial plants, there is, in view of the great industrial development of the State, scarcely any power granted to the commission that is of greater importance. Owing to the exigencies of their business as well as the greater cost of land immediately at railroad stations and in towns, many factories, and especially most lumber plants, are usually situated at some distance from any passenger and freight station, though ordinarily on the line of some railroad. To require their products, which are usually shipped in carload lots, to be hauled to a distant station, often over bad roads, when the trains, perhaps, pass within a few yards of the plant, would entail a great and useless expense to the great discouragement of such enterprises in our midst. To avoid this, the railroads, whenever the receipts, in their judgment,

will justify it, have for years been putting in such sidings, upon which empty cars are placed when called for, and when loaded are taken away by some passing train. Such sidings are not passenger or freight stations, named in sub-sections 12, 13, 13a and 14, and have not (except possibly in rare instances) any agent.

Prior to the enactment of this provision of the statute, the establishment of such sidings rested in the arbitrary will of the common carrier, who could also discontinue such sidings at will. Such power, it will be seen at once, placed the industrial development of the State at the mercy of the railroad management, which could mar the prosperity of any plant along its line by refusing a siding, or arbitrarily discontinuing it, if established. This power could be used for both political and pecuniary advantage. Whether it was ever so used or not the General Assembly, while not prohibiting the carrier from continuing to establish such sidings at its pleasure, deemed it wise to take the power of refusing to grant or continue such sidings out of the arbitrary will of the common carrier by authorizing the Corporation Commission to require the establishment of such sidings in proper cases. It did not, however, substitute the arbitrary power of the commission for the arbitrary power of the carrier, but it gave the former authority to require such sidings only when the "revenue accruing from such sidetrack is sufficient within five years to pay the expense of its construction," and subject also to a review of the reasonableness of such order on appeal to the Superior Court, and by further review as to the rulings on the law to this court. By a subsequent act, Laws 1903, chap. 444, amended by chap. 693 of the same year, a penalty is imposed for refusing to receive loaded cars at such sidetracks as well as at regular depots or stations—showing that the Legislature was advertent to the distinction and difference between such sidings and "regular stations."

In the present case, the Corporation Commission, upon

petition of the Round Pine Lumber Company, ordered the establishment of such siding, sufficient to hold four cars, on the line of defendant road, at the 24th mile post from Raleigh, and about one and a quarter miles north of Merry Oaks station. The lumber company agreed to prepare the grade for said siding and to furnish the cross ties for the same, and to have the switch lamp for said siding lighted every night while it should be in existence. The Corporation Commission found that approximately 20,000,000 feet of lumber would be shipped by the lumber company from said siding in two years, yielding a revenue of not less than $6,000 to the defendant, and that the cost to the defendant of constructing the siding, the grading being done and cross ties furnished by the lumber company (as offered), would be about $200, and ordered that, upon the petitioner's doing the grading and furnishing the cross ties, the defendant construct on or before 23 August, 1905, a spur siding as prayed, to hold four cars.

An appeal to the Superior Court was taken upon the ground that the order was unjust and unreasonable; that it would entail considerable and unnecessary cost upon the defendant, which would be taking its property for private purposes without compensation; that the commission had no right to make the order; that the petitioner's mill was 800 yards from the defendant's track, and hence the petitioner could not use the siding without hauling that distance or constructing a tram road; and, lastly, that putting in the siding would increase the hazard in operating the defendant's road.

Upon appeal, in the Superior Court, three issues only were submitted, and without exception: 1. Was it reasonable that the defendant be required to construct the spur siding for the convenience of the petitioner as prayed for? 2. Is the spur siding a necessary convenience for the use of the petitioner in the shipment of freight from its saw mill? 3.

Will the revenue accruing to the defendant from such spur or sidetrack from the shipment of freight, within five years, be sufficient to pay the expenses of its construction? The jury responded "yes" to each of these issues and judgment was entered, reaffirming the order made by the Corporation Commission, but extending the time for its execution till 3 November, 1905.

Upon appeal to this court the defendant frankly admits in its brief that "the order appealed from does not lessen the revenues of the road, but distinctly tends to increase the same," and rests its case almost entirely upon the allegation that putting in the sidetrack would increase the hazard of operating its road by reason of the additional switch required. But this point, if it could be made one of law, is not raised by the tender and refusal of an issue as to such alleged fact, nor was it presented, as might probably have been done, by an appropriate prayer upon the first issue. It was presented as an issue of fact by the argument and evidence, on the first issue, to the jury on the trial and the finding upon the issue was adverse to the contention of the defendant. There was neither any prayer for instruction refused, nor any exception to the charge.

If it is competent for us to take judicial notice of such matters, we should say that while there is some danger that this switch may be misplaced, there is also risk as to any other switch on the line of the defendant's road, just as there is danger that any rail if not renewed may become worn, or any cross tie if not removed in time may become rotten, and cause derailments; but these are risks necessarily incident to the defendant's business and to be guarded against by its diligence, and certainly the supposed danger from adding one switch to the great number now on the defendant's line is not a sufficient cause, as a matter of law, to reverse the judge's order made upon the responses to the issues submitted to the jury, without exception from the defendant and

without a prayer for instruction upon this aspect of the case.

There was, as already stated, no exception to the charge, and the only exception to the evidence is that the plaintiff was permitted to show that a few years ago the defendant's road maintained a spur or sidetrack at this same spot for two years, without inconvenience or accident. This was competent, certainly to show the practicability of a sidetrack being established at that point, and requires no serious consideration. Indeed the argument in this court was chiefly upon the evidence whether it showed the order of the commission to be a reasonable one, which was properly a matter for consideration by the jury and which has been passed upon by them under instruction from the court with which the defendant was satisfied, as it filed no exceptions thereto. There was evidence, too, that the facilities offered the petitioner at Merry Oaks were entirely inadequate for the accommodation of its shipments, aside from the evidence that it would add $5 to $8 to the cost per car load, if the petitioner were required to ship from that point, and that it would be impossible to haul from the saw mill to Merry Oaks in the winter at all.

We affirm the judgment of the Superior Court, and as the date of its execution, 3 November, 1905, has now passed, final judgment will be entered here directing the execution of the work in the same terms as prescribed by the judgment of the Superior Court, on or before 15 February, 1906. This course was pursued in the *Railroad Connection case,* 137 N. C., and in other cases therein quoted on page 21.

Affirmed.

CONNOR, J., concurring. For the reasons set out in the opinion and upon the authority of the cases cited, I concur in the opinion of the court that the statute confers upon the commission the power to require the construction of sidetracks upon the terms and conditions prescribed. Whether

the order is a reasonable one, was submitted to the jury, and answered by them as set out in the record. To this there was no exception. In view of the fact that the cause was tried in that way, I do not care to discuss the question—whether what is a reasonable regulation is a question of law for the court or a fact to be submitted to the jury. The usual rule undoubtedly is that what is a reasonable time, or a reasonable notice, or reasonable regulation upon the facts admitted, or found by the jury, if disputed, is a question of law. The practice in regard to the validity of orders made by the Corporation Commission not being well settled and not having been discussed in this case, I do not wish to be understood as expressing any opinion in regard to it. I do not think the exception to His Honor's ruling upon the question of evidence is reversible error. There are expressions in the opinion, to which I cannot give my assent, not being, in my opinion, pertinent to the questions presented for our decision. I simply concur in the disposition made of this case.

WALKER, J., concurs in the concurring opinion of CONNOR, J.

BROWN, J., dissenting.

FINCANNON v. SUDDERTH.

(Filed December 12, 1905).

Deeds—Descriptions—Rules of Construction.

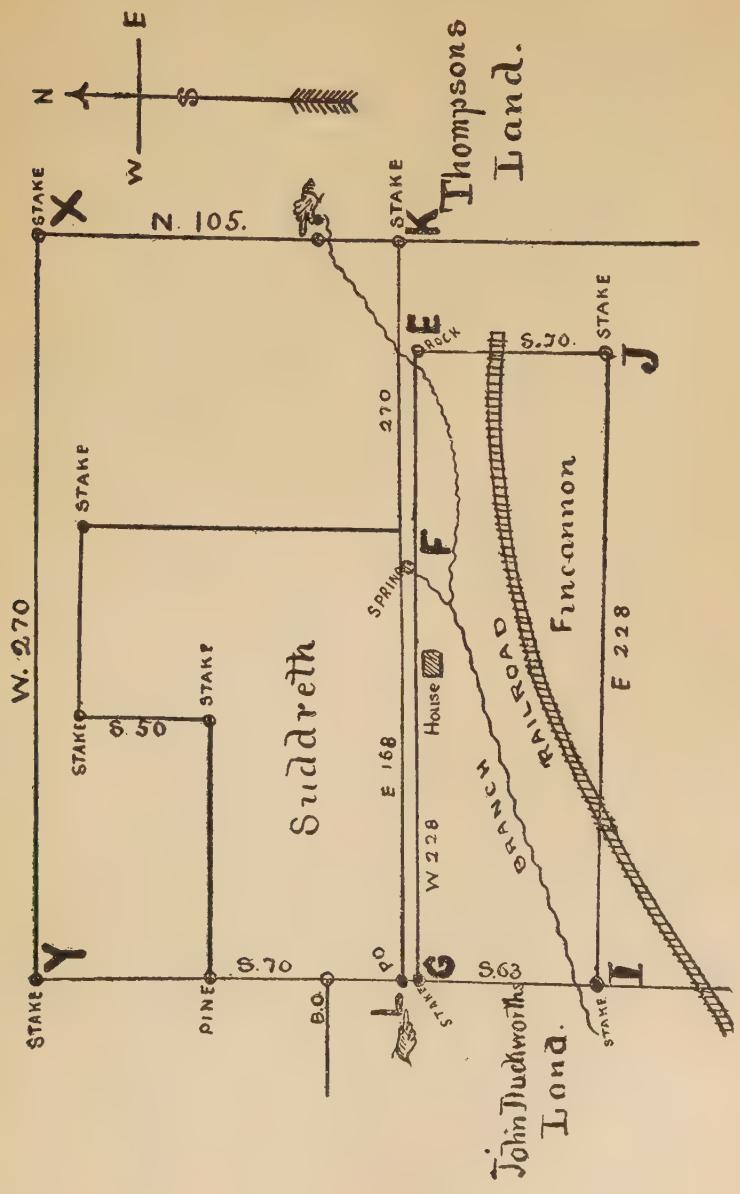
1. Where the lines or corners of an adjoining tract are called for in a deed or patent, the lines shall be extended to them without regard to distance, provided these lines and corners be sufficiently established, and that no other departure be permitted from the words of the patent or deed, than such as necessity enforces or a true construction renders necessary.

2. Under the above rule, the words in a deed, "being a corner of a tract owned by S, and known as the J tract, and runs west with the line of the S tract 228 poles to a stake in the old D line," control the other contradictory calls for a "rock," etc., there being no evidence as to how the rock came to be at the point or how long it had been there.

3. The rule that whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the deed shall hold accordingly, notwithstanding a mistaken description of the land in the deed, presupposes that the deed is made in pursuance of the survey, and that the line was marked and the corner that was made in making the survey was adopted and acted upon in making the deed.

ACTION by W. A. Fincannon and others against Ed. Sudderth and wife, heard by *Judge W. A. Allen* and a jury, at the August Term, 1905, of the Superior Court of BURKE.

Plaintiffs claim the *locus in quo* under deeds from their father, Isaac Fincannon, executed in 1887 for the purpose of making a division of his lands. They alleged that defendants had trespassed thereon. Defendants denied plaintiffs' title. For the purpose of fixing their boundaries, plaintiffs introduced a grant issued 1794 to John Hughes, in which the call for the southwest corner is a small post oak—running thence east, etc. This is indicated on the plat so—"L. P. O." They introduced a deed from C. A. Cilley, commissioner,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House
W 228
BRANCH
RAILROAD
Fincannon
E 228
Y
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PINE
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B.O.
STAKE
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S. 63
STAKE
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STAKE
John Duckworths
Land.

appointed in a proceeding instituted for the purpose of partitioning the lands of John Sudderth to B. A. Berry, bearing date March 25, 1882, describing the land conveyed as a part of the John Hughes grant. They next introduced a proceeding for the partition of the lands of B. A. Berry, and a deed from the commissioners to Mrs. Sudderth, calling for "a post oak and running east with Cannon's line 158 poles to a small pine," etc.

They introduced a deed from B. A. Berry to Isaac Fincannon dated 1876—a deed from Dean to Berry dated 1871. These deeds call for "a rock near a small branch and 22 poles north of the railroad, being a corner of a tract of land owned by the heirs of S. A. Sudderth, deceased, and known as the Johnson tract, and runs west with the line of the Sudderth tract 228 poles to a stake in the old Jonathan Duckworth line," etc. They introduced three deeds executed April 21, 1887, from Isaac Fincannon to each of the plaintiffs, all calling for the Berry line, as the northern boundary. Plaintiffs introduced one Hudson, who testified that he had seen line run from the post oak. It had been pointed out as John Sudderth corner. He looked at it—three marks on it—letters "J. S." on west side. Had never seen land run from rock. Mr. Denton testified that he run Sudderth land by Cilley deed. Began at post oak and run east—old marked line—thickly marked—found pointers at end of line. There was testimony that Berry said the post oak was his corner. Defendant introduced Mr. Huffham, who testified that he surveyed the land when Berry conveyed to Fincannon for the purpose of making deed. "Begun center of railroad—run north to rock, understood it to be corner of S. A. Sudderth's tract and Hughes grant—also known as Johnson tract, rock there. Begun at E, then to G, at Duckwell's line—then to I—then to J from E to G, known as line of Sudderth tract—was marked then and now. At G pointers. Do not think I marked line. Marked line from G to I. Never heard of

line from P. O. till this suit," etc. There was evidence tending to show that Fincannon had been in possession of land to line from post oak east for many years. Plaintiffs insisted that their northern boundary was the southern boundary of Berry line—from post oak east. That the call for rock was a mistake, and that the controlling call was for Sudderth-Johnson land. They requested His Honor to instruct the jury: "The calls in the deed under which plaintiffs claim are: Beginning on a rock near a small branch and 22 poles north of the railroad, the same being a corner of a tract of land owned by the heirs of S. A. Sudderth, deceased, or the heirs of John Sudderth, deceased, and known as the Johnson tract, and runs west with the line of Sudderth tract 228 poles to a stake in the old John Duckworth line, and the court charges you that if the jury can find and fix the line of the tract so called for, and if it was marked or defined at the time the plaintiffs' deed was executed, that the calls of the plaintiffs' deed would be controlled by the call for the Sudderth or Johnson tract, and would go to and run with it to the old Jonathan Duckworth line, if the Jonathan Duckworth line can be located, and this would fix the boundary of the plaintiffs' land." His Honor declined this instruction and intimated that he would charge the jury that if they found from the evidence that at the time of the execution and delivery of the deeds under which plaintiffs claim there was a contemporaneous survey of the lands conveyed thereby for the purpose of locating the lines and boundaries thereof and the line was located and run with the line E G, and that it was the intention of the grantor and grantees that it should run with the red line, then said line would be the boundary of the plaintiffs' land, notwithstanding the calls in said deeds." Plaintiffs excepted, submitted to judgment of nonsuit and appealed.

J. T. Perkins for the plaintiffs.
Avery & Ervin for the defendants.

CONNOR, J., after stating the case: The sole question presented by the plaintiffs' exception to His Honor's ruling is whether, by a proper construction of the deed from Berry to Isaac Fincannon, the call for the Sudderth-Johnson tract shall control the other calls, thus making the southern boundary of that tract their northern boundary. The third rule for construing the language used in deeds in respect to boundary laid down by *Chief Justice Taylor* in *Cherry v. Slade,* 7 N. C., 90, is: "Where the lines or corners of an adjoining tract are called for in a deed or patent, the lines shall be extended to them without regard to distance, provided these lines and corners be sufficiently established and that no other departure be permitted from the words of the patent or deed, than such as necessity enforces or a true construction renders necessary." The reason of the rule is stated with his usual clearness by the learned *Chief Justice.* This is the leading case on the question of boundary in our reports and has been uniformly followed, the last case in which it is discussed being *Hill v. Dalton,* at this term. Applying the rule to the deed in question, we would hold that the words "being a corner of a tract of land owned by the heirs of S. A. Sudderth and known as the Johnson tract, and runs west with the line of the Sudderth tract 228 poles to a stake in the old Jonathan Duckworth line," would control the other calls when contradictory. The defendants, however, contend that another rule should be invoked and applied by which the call for the "rock," followed by the other calls running therefrom, shall control and thereby discard the call for the Sudderth-Johnson land.

In *Cherry v. Slade, supra,* the rule is thus stated: "Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the deed or patent." It was this rule which His Honor intimated he

would instruct the jury to apply in locating plaintiffs' deed. There can be no question that this court has frequently approved and applied it. The last instance in which it was discussed and the cases in which it was applied reviewed, is in a well considered opinion by *Mr. Justice Douglas* in *Elliott v. Jefferson,* 133 N. C., 207. We could add nothing to the exhaustive and satisfactory review of the authorities in that case. Quoting the language used in *Safret v. Hartman,* 50 N. C., 185, he says: "This rule presupposes that the patent or deed is made in pursuance of the survey, and that the line was marked and the corner that was made in making the survey was adopted and acted upon in making the patent or deed, and therefore permits such line and corner to control the patent or deed, although they are not called for, and do not make a part of it." The plaintiffs insist that there is no evidence tending to show that at the time of, and with a view to the making of the deed by Berry, or at any other time, the line contended for by defendants was surveyed and marked and corner marked. The only witness introduced by defendants was Mr. Huffham, who says that he surveyed the land and understood the rock to be the corner of S. A. Sudderth's land and Hughes' grant—also known as Johnson tract, he found marks but did not mark line. It is evident that he supposed that he was on Sudderth line. This testimony does not bring the case within the rule which defendants invoke. It is evident from the other testimony that Fincannon's northern boundary was regarded and treated as the Sudderth line. The evidence appears to be conclusive that the post oak is the beginning point in the Sudderth-Johnson line, being the same as the Hughes grant, and that Berry claimed it as his corner. After his death the same line was recognized by his representatives, the deed made by the commissioners in the proceeding for partition, calling for "a post oak and running east with Cannon's (which we understand to be Fincannon's) line." There is no evidence as to

how the rock came to be at the point found by Huffham, or how long it had been there. It is much more probable that a mistake was made in locating the rock than that the parties intended to depart from the old marked Sudderth line. It was in evidence that Fincannon had been in possession to the Sudderth line for thirty-five years, and that Berry never cut wood south of that line. There is no serious controversy in respect to the law. We think His Honor gave undue weight and force to Mr. Huffham's testimony. It does not bring the case within the principle upon which defendant's contention must rest. The plaintiffs were entitled to the instructions for which they prayed. The judgment of nonsuit must be stricken out and a new trial had. It is so ordered.

New Trial.

SHERRILL v. RAILROAD.

(Filed December 12, 1905).

Railroads — Crossings — Master and Servant — Employee Working Near Track—Negligence—Contributory Negligence.

1. One who enters on a public railroad crossing is required to look and listen, and when he fails in this duty and is injured in consequence, the view being unobstructed, under ordinary conditions such person is guilty of contributory negligence.

2. Negligence having first been established, facts and attendant circumstances may so qualify the obligation to look and listen, as to require the question of contributory negligence to be submitted to the jury, and in some instances, the obligation to look and listen may be altogether removed.

3. The above principle, with its limitations, applies with peculiar force to those whose duties, by contract with the railroad, call them to work on or upon the tracks or frequently to cross the same.

4. Where the testimony of the plaintiff tended to show that his duties by contract with the defendant railroad caused him to work almost on the track and frequently required him to be upon and across it, and that while so engaged he was run over by an engine of the defendant which had come upon him without any warning, and which warning was required both by the custom and rules of the railroad, and that he had just looked and listened both ways, and the way then appeared clear, *held*, that a nonsuit was erroneous as the question of contributory negligence must be left to the jury to determine under proper instructions.

ACTION for personal injuries caused by alleged negligence of defendant, heard by *Judge W. B. Councill* and a jury, at May Term, 1905, of the Superior Court of CATAWBA. The ordinary issues were raised by the pleadings.

There was evidence tending to show that the plaintiff was at the time of the injury engaged in superintending the construction of a union depot at Helena, Ga., for the defendant and the Seaboard Air Line Railway Companies. The tracks of the two railroads crossed each other at right angles and the depot was being constructed in one of the angles and within a few feet of the tracks, and within the yard limits of the defendant at that point. The plaintiff's duties required him to cross and recross the defendant's track at frequent intervals in order to properly superintend the construction of the work. The depot which was being built had two fronts, one facing the track of the defendant, and the other the track of the Seaboard.

The defendant's employees were accustomed to give warning of the approach of the trains at that point by sounding the whistle and ringing the bell, and the rules of the company required that adequate warning should be given. On the occasion when the plaintiff was injured, no warning of any kind was given, and the plaintiff, in endeavoring to cross the track, was struck by one of the defendant's trains and severely injured. The plaintiff, who was the only witness examined, speaking to the main features of the charge, testi-

fied as follows: "I was setting door and window frames. After I got them set, I stepped across the Southern and walked up and down to see if the frames were level. There was a belt over the doors and windows, running around the whole building, and the frames had to be on line at the top. I stepped across and walked up and down the platform to see if these frames were on a line; I had to get off to do this, and could not have done it properly any other way. The Seaboard train was standing across the Southern and I walked to the side of the depot on the Seaboard line, and cautioned the men about letting blocks of timber fall from the building. I pulled out a piece of scantling 4x6, that had fallen from the building, and walked back across the Southern on to the platform, and gave a few steps, and the Seaboard train was then pulling out. I made straight back to my men. I don't think I walked over 15 feet. I walked straight to the men across the road and the engine of the Southern caught me. I had no notice or knowledge of the presence of the engine until I was struck. I did not hear the ringing of the bell, nor a signal of any kind. It was not more than half a minute. I looked and saw the Seaboard train, just started, and was about stepping across the road. I don't think I walked more than 15 feet when the engine struck me. I cannot tell at what speed the engine was running; it was all done so quick I could not see. I was walking right fast. When I started down the Southern the last time, returning to my men, I looked back and the Seaboard was on the crossing, moving off. I looked both ways and there was nothing there. I looked both ways and did not hear anything. I heard nothing. I heard the rumbling of no car and no whistle. I was using every precaution I could."

On cross-examination he stated that when he started down the Southern track the last time, he was 10 or 12 feet from the Seaboard track, and looked both ways. He then walked nearly 30 feet before he undertook to cross, or something

like 20 feet, and did not look back again. He walked down the track and stepped over, and that if he had looked just as he stepped on the track, he could have seen the train which struck him; that he was not struck just as he stepped on the track, but just as he was making the last step off the track. At the close of the testimony, on motion, the court directed a nonsuit and the plaintiff excepted and appealed.

W. C. Feimster and *M. H. Yount* for the plaintiff.
S. J. Ervin for the defendant.

HOKE, J., after stating the case: We have held in *Cooper v. Railroad,* at this term, that one who enters on a public railroad crossing is required to look and listen, and when he fails in this duty and is injured in consequence, the view being unobstructed, under all ordinary conditions such person is guilty of contributory negligence. It is further held that negligence having been first established, facts and attendant circumstances may so qualify this obligation to look and listen, as to require the question of contributory negligence to be submitted to the jury, and in some instances the obligation to look and listen may be altogether removed.

The principle, with its limitations, applies, we think, with peculiar force to those persons whose duties, by contract relation with the railroad company, call them to work on or upon the railroad tracks, or frequently to cross the same, and is sustained by abundant authority. *Cooper's case, supra; Erickson v. Railroad,* 41 Minn., 500; Shearman & Redf. on Neg., sec. 476; *Laverentz v. Railroad,* 56 Iowa, 689; *Nixon v. Railroad,* 84 Iowa, 331; *Rodrian v. Railroad,* 125 N. Y., 526; *Jennings v. Railroad,* 112 Mo., 268.

In Shearman & Redfield, *supra,* it is said: "A traveler must look in every direction * * * but circumstances may excuse him from looking more than once. There is no arbitrary rule requiring him to look constantly.

In *Rodrian's case, supra, Agnew, J.*, said (quoted also in *Cooper's case, supra*): "But where one has looked for an approaching train it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time, when and where looking would have been of the most advantage."

The facts in *Jenning's case* are very similar to the one before us so far as the obligation to look and listen is concerned. As pertinent to the question they are stated thus: "Plaintiff, before passing these cars, looked west along the street he was traveling, and saw it was open. He could not see south on the second sidetrack because of cars on the first. He looked in that direction, however, saw no one on top of any car, and heard no engine bell ringing, though he saw the smoke from an engine. He crossed over the first track, upon which the cars were standing, and while looking north at the approaching train on the main track, stepped upon the sidetrack without again looking south, and was immediately struck, knocked down and run over by some freight cars, five in number, which had been kicked by an engine from a point 300 or 400 feet south of Lesperance street." On these facts, there was verdict and judgment for the plaintiff, and in affirming the judgment the court held that "the rule that a person who goes on a railroad track or purposes crossing it, must use his eyes and ears to avoid injury, and if he neglects to do so he cannot recover, notwithstanding the negligence of the company, is not of universal application, but has exceptions under exceptional circumstances, and the facts of this case make an exception to the rule."

Applying these decisions to the facts testified to by the plaintiff, we hold there was error in directing a nonsuit. The plaintiff's duties by contract with the company (whether through himself or under his employer, who was a contractor with the company, makes no difference) caused him to work almost on the track, and frequently required him then and

there to be upon and across it. While so engaged, he was run over by an engine of the defendant company, which had come upon him without any warning, and which warning was required both by the custom and rules of the company. More than that, he had just looked and listened both ways, not at the precise time when he started to cross the track, but only several seconds before, and the way then appeared clear. He says half a minute, but, as a matter of fact, you could walk the distance, he says he went, and at the rate he says he was moving, in five or six seconds. To hold him to a constant looking would disqualify him from doing his work, and as a matter of law it is not required of him.

If the negligence of the defendant is properly established, we are of opinion that on the evidence, set forth in this case, the question of contributory negligence must be left to the jury to determine under proper instructions, and on the facts as they shall find them. The case, we think, comes within the principles so clearly stated in *Smith v. Railroad*, 132 N. C., 825. There is error and a new trial is awarded.

New Trial.

McADEN v. PALMER.

(Filed December 12, 1905).

Entries and Grants—Registration—Statute of Limitations—Trusts and Trustees—Constructive Notice—Laches.

1. In an action for trespass commenced in 1902, in which defendants ask to have plaintiff declared trustee of the legal title for them, where plaintiff claims under an entry laid and surveyed in 1859, grant issued in 1867, and registered in 1884, and defendants claim under an entry laid in 1854, surveyed in 1855, entry price paid in 1858, and grant issued and registered in 1896, *held*, that the defendants are barred under section 158 of The Code.

2. Section 158 of The Code covers all causes of action equitable or legal, not otherwise provided for. It bars the assertion of an equity as well as any other cause of action, unless there are circumstances which take the case out of the statute.

3. The registration of the plaintiff's grant in 1884 vested the legal title in him and was constructive notice to all the world that he claimed the land as his own.

4. If the defendants had shown possession of the land, their delay of eighteen years in suing would not have precluded them from seeking the aid of the court in converting the plaintiff into a trustee for their benefit, but as they show no such possession, they have slept on their rights too long.

Action by J. H. McAden, Trustee, against John Palmer and others, heard by *Judge G. S. Ferguson* and a jury, at the August Term, 1905, of the Superior Court of Cherokee.

This was an action to recover damages for cutting timber on certain land claimed by the plaintiff. The jury found, among other facts, that the defendants, Barnes, Williams and VanRoden, had wrongfully trespassed and asesssed the damage at $261.72. From the judgment rendered, the defendants appealed.

Dillard & Bell for the plaintiff.

E. B. Norvell for the defendants.

BROWN, J. (1) The principal question appearing upon the record, which it is necessary for us to consider, is that presented by the eighth issue: "Is the defendants' claim of equity to have the plaintiff declared trustee of the legal title for them, barred by the statute of limitations?"

The defendants claim the *locus in quo* under an entry laid by one John P. Puett, November 3, 1854. The survey was made on February 22, 1855, and the entry price paid on or before September 9, 1858. John Puett transferred his entry to D. S. Puett, who, on December 21, 1896, obtained a grant and registered it.

The plaintiff claims under entries by J. R. Dyck laid in April and May, 1859, surveyed May 27, 1859, grant issued November, 1867, and was registered June 6, 1884.

This action was commenced December 6, 1902. We think the defendants barred under section 158 of The Code, which provides that an action for relief, not otherwise provided for, must be commenced within ten years after the cause of action accrues. The learned counsel for the defendants, Mr. Norvell, admitted in his able argument that *Ritchie v. Fowler,* 132 N. C., 790, is a direct authority against him, and we are unable ourselves to distinguish between the cases. Under that authority, these defendants' cause of action accrued June 6, 1884, when the grant issued upon the Dyck entries was registered. In that case the present *Chief Justice,* speaking for the court, says: "The registration of the Herrin grants in 1872 was *constructive notice* to the plaintiff and those under whom he claims, and in the absence of evidence showing that the statute did not run by reason of coverture, infancy, etc., the plaintiff is barred by failure to take this action within ten years from October, 1872. Code, sec. 158."

Puett perfected his equity and right to call for the grant by paying to the State the purchase money in 1858, but he and his assignee, D. S. Puett, waited until 1896 before calling for the grant. During these thirty-eight years there is no evi-

dence of any possession upon the part of the defendants or of those under whom they claim. In fact, there is no evidence of possession until about 1902, when the defendants, Barnes, Williams and VanRoden, entered and cut timber upon the land.

The section (158) of The Code is so broad and comprehensive in its terms that it covers all causes of action, equitable or legal, not otherwise provided for. It bars the assertion of an equity as well as any other cause of action, unless there are circumstances which take the case out of the statute. The grant, registered in 1884, vested the legal title in the grantee. Registration has been held heretofore by this court to be constructive notice to all the world that the grantee claimed the land as his own. *Ritchie v. Fowler, supra.* "The legal title vesting in the first grantee drew the constructive possession which continued until there was an ouster." *Janney v. Blackwell,* 138 N. C., 442. The attempted ouster did not take place until 1902 (as we gather from the meagerly reported evidence), eighteen years from the registration of the plaintiff's grant. During this period, the plaintiff was exposed to an action by Puett and his assignees, and could have been converted into a trustee for their benefit, had they not slept on their rights.

The kind of trust which the defendants seek to impress upon the legal title to the land in the plaintiff is not an express trust created by the language of the parties, the terms of which were agreed to and assumed voluntarily. It is in the nature of an implied trust and requires the affirmative action of a court of equity to give it vitality. Bispham Eq., pp. 99, 125. Independently of statutes of limitation, courts of equity uniformly decline to assist a person who has slept on his rights and shows no excuse for his delay in asserting them. "Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court." *Smith v. Clay,* 3 Bro.,

Ch. 640; *Speidel v. Henrici,* 120 U. S., 387. We note this to show that the time, within which an equity will be enforced, has always been subject to a limitation independent of acts of legislation.

"That one may preclude himself by his laches from asserting a right which otherwise a court would help him enforce, there are abundant authorities to show; but to do so in any case there must be something on his part which looks like an abandonment of the right, or an acquiescence in its enjoyment by another, inconsistent with his own claim. We have searched in vain for a single instance in which the court has withheld its aid in the enforcement of an equity on the ground of the lapse of time when the party seeking it has himself been in the continued possession of the estate, to which that equity was incident." If the defendants had shown possession of this land or such acts of ownership as indicate and establish possession, their delay in suing would not have precluded them, even now, from seeking the aid of the court in converting the plaintiff into a trustee for their benefit; but as they show no such possession, they have slept on their rights too long. There being no suggestion of coverture or infancy or other disability, and no possession, we can discover no reason why section 158 should not apply to the defendants' cause of action, although equitable in its nature, as well as any other.

As between the State and himself, having paid the purchase price, Puett could call for a grant at any time. The lapse of time would not hurt him. *Gilchrist v. Middleton,* 107 N. C., 678. But, as between himself and the State's grantee for value, he must assert his equity within the time fixed by the statute or lose it. It is suggested in the defendants' brief that the decision in *Ritchie v. Fowler, supra,* will unsettle "fully one-third to one-half the land titles in Western North Carolina." While we regret this, we are not responsible for the acts of the law-making power. Statutes of limitation are

statutes of repose, and intended for the prevention of litigation and the security of titles. They are subject to the authority and wisdom of the General Assembly.

(2) It is stated in the defendants' brief that "the court erred in admitting the evidence of Hays and Keener, relative to locating any of these lands." The brief does not point out the particulars in which His Honor is alleged to have erred; nevertheless, we have examined the evidence and fail to discover any error upon the question of location of the plaintiff's grants. In the language of their counsel's brief "upon the question of location, the judge followed the law as laid down by a long line of time-honored precedents."

Affirmed.

WALKER, J., did not sit.

JONES v. CASUALTY CO.

(Filed December 12, 1905).

Insurance Policies—Rules of Construction—Provisos—Repugnant Clauses—Blood Poisoning.

1. Where in the main body of an insurance policy there is a definite stipulation of indemnity in case of disability arising from certain specified diseases, blood poisoning being one expressly named, various provisos entirely withdrawing blood poisoning from the operations of the policy cannot avail to defeat the plaintiff's recovery for the indemnity for disability arising from said disease.

2. In the construction of insurance policies, all doubt or uncertainty as to the meaning of the contract, shall be resolved in favor of the insured.

3. While clauses in a contract apparently repugnant must be reconciled if it can be done by any reasonable construction, yet, a proviso which is utterly repugnant to the body of the contract and irreconcilable with it, will be rejected.

4. A subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract, will be set aside.

ACTION on an insurance policy for an indemnity of $5 per week for 26 weeks, tried before *Judge M. H. Justice,* at the July Term, 1905, of the Superior Court of McDOWELL.

A jury trial was waived, and from the findings of fact by the court it appeared that the plaintiff, being the holder of an ordinary health policy in defendant company, on the 29th day of November, 1902, received a small scratch on the hand, that the same began to inflame; blood poisoning developed, and on December 3, 1902, the plaintiff's arm was of necessity amputated; that the plaintiff was rendered incapable of performing any kind of manual labor and continued so disabled for a term of 26 weeks, for which time he sues for the stipulated indemnity; that all the former preliminary requirements have been complied with on the part of the plaintiff, and proof of the plaintiff's disability for 26 weeks duly filed with defendant company. There was judgment for the plaintiff at the contract rate and the defendant excepted and appealed.

D. E. Hudgins for the plaintiff.
J. W. Pless for the defendant.

HOKE, J., after stating the case: The policy, section 4, contains a definite stipulation for indemnity at $5 per week, not to exceed 26 weeks, in case of disability arising from certain specified diseases, blood poisoning being one expressly named. This disease being evidently the direct and controlling cause of the disability, as a matter of first impression, the right of the plaintiff to recover would seem to be clear. The policy, however, having given this assurance of indemnity, then takes up the matter of provisos by way of restriction and stipulates further: 1. That this policy shall not apply to any

illness or disease whatever except those named. 2. That it shall not apply to any disease which is complicated with, or results from any disease not herein named, etc. 3. Nor to any disease or illness which results from injury, etc. 4. Nor in effect to any disease which develops or results from those diseases that are named, etc.

There are many other limitations and restrictions in the policy, for as my *Lord Coke* would say, the "etc." meaneth much; but those set out are enough to show that if these provisos can prevail, blood poisoning is entirely withdrawn from the operation of the policy, and any and all stipulation for indemnity concerning it effectually removed. So far as we are informed, blood poisoning is not considered as one of the primary or idiopathic diseases. It is a toxic condition of the blood caused either from or through a surface wound or some internal lesion, or from the breaking down of tissue incident to an existent or precedent disease, and thereby producing suppuration. As to this disease, therefore, these provisos remove every possible condition where the disease can occur, and, if upheld, would, as stated, entirely set aside the definite contract for indemnity contained in a former clause of the policy. Such a result cannot be permitted and is not sustained by authority. It is established doctrine in construing these policies that doubts shall be resolved in favor of the insured. As stated in Vance on Insurance, p. 592: "Probably the most important general rule guiding the courts in the construction of insurance policies is that all doubt or uncertainty, as to the meaning of the contract, shall be resolved in favor of the insured." And speaking of certain kinds of special insurance, this author further says: "This rule, it is well settled, applies in full force to those contracts of special insurance which, unfortunately for both insurers and insured, are often filled with numerous conditions, the legal significance and economic purpose of which are alike uncertain." In *Kendrick v. Insurance Co.*, 124 N. C., 315, it is held:

"The uniform rule of construction of insurance policies is that, if reasonably susceptible of two constructions, that one shall be adopted which is most favorable to the insured."

Another principle applicable to the case before us, and equally well established, is that while clauses in a contract apparently repugnant must be reconciled if it can be done by any reasonable construction, yet, a proviso which is utterly repugnant to the body of the contract and irreconcilable with it, will be rejected; likewise, a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract, will be set aside. *Hawkins v. Lumber Co.*, at this term; Bishop on Contracts, secs. 386 and 387; Devlin on Deeds, sec. 838; Beach on Modern Law of Contracts, sec. 718.

Our conclusion is that, as to blood poisoning, the various restrictive provisos are entirely repugnant to the definite stipulation of indemnity contained in the main body of the contract, and are contrary to the general intent and purpose of the policy, and cannot avail to defeat the plaintiff's recovery.

Judgment Affirmed.

ROSE v. DAVIS.

(Filed December 12, 1905).

Cattle Running at Large—Non-residents—Burden of Proof —Penalty—Special Proceeding for Partition—Collateral Attack.

1. In an action to recover the penalties provided in section 2319 of The Code for illegally ranging cattle and sheep in Swain County, in order to justify the defendants in ranging their cattle and sheep the burden is upon them to show that they own an estate in land in said county for one year or other higher estate and the question of the defendants' good faith and *bona fide* claim of title to land does not enter into the case.

2. Under section 2319 of The Code, if a non-resident owns an estate in land in the county, for one year or other higher estate, he may bring into the range twenty head of the beast mentioned. If he brings in more than twenty, he must show such an estate in two hundred acres of land for every additional twenty head.

3. Although the summons in a special proceeding is not in the record, yet where it sufficiently appears in the affidavit and order for publication that a summons was issued and that a return was made thereon that the defendants could not be found "after due search;" that the defendants are non-residents and have an interest in the property, etc., and the notice of publication is in the record and is full and explicit, and where it appears the land was sold for partition, the purchase money paid, the sale confirmed and deed made in due form, *held*, there are no defects sufficient to avoid the sale.

ACTION by Q. L. Rose against J. R. Davis and others, heard by *Judge C. S. Ferguson* and a jury, at the July Term, 1905, of the Superior Court of SWAIN. From a judgment for the defendants, the plaintiff appealed.

This is an action brought by the plaintiff under section 2319 of The Code, for the penalties mentioned therein. That section of The Code is as follows: "If any person who shall be a resident citizen of another State or one of the territories

shall drive or cause to be driven into any county in this State, any horses, mules, hogs, cattle or sheep, between the first day of April and the last day of November, and suffer them to run at large in any marsh or forest range in this State, he shall forfeit five dollars for each head so permitted to run at large to anyone who may sue for the same, or proceed by attachment, in case the offender is not to be found, one-half to the party suing for the same, the other half to the school fund of the county. Provided, this section shall not apply to any non-resident, who for the time being, may own in said county any estate in land for one year, or other higher estate, unless such non-resident shall bring into the range more than twenty head of any of said beasts for every two hundred acres of land owned by him in manner aforesaid in said county." There are other provisos, but they are not material to this case.

Fry & Rowe for the plaintiff.
No counsel for the defendants.

BROWN, J. It was admitted and found on the trial that plaintiff was a resident of this State and that the defendants were non-residents. The plaintiff offered evidence to the effect that the defendants, in the year 1903, between the first day of April and the last day of November, drove or caused to be driven into Swain County 220 head of sheep and cattle, and ranged them in the forests of the Smoky Mountains in said county. The defendants offered evidence to the effect that they drove only 120 head, and also evidence tending to show that they had such an estate in 1200 acres of land in said county as would justify them for driving that number of sheep and cattle into said county by bringing themselves within the purview of the first proviso contained in section 2319 of The Code.

The plaintiff seeks to recover the penalty provided in the

act for illegally driving and ranging 120 head of sheep and cattle in Swain County. The court submitted certain issues to the jury, to which there was no exception. The first issue was as follows: Did the defendants or either of them drive or cause to be driven between the first day of April, 1903, and the last day of November, 1903, unlawfully and without right or authority into the county of Swain, in the State of North Carolina, cattle or sheep, and unlawfully and without right or authority range or cause to be ranged in the forests and commons in said county and State, and cause them to run at large in the forests of said county; and if so, how many? Answer: No.

The defendants contended that they did not drive more than 120 head of cattle and sheep during the said year and sought to justify by showing a claim or title to certain land. His Honor charged the jury, among other things, that if the defendants believed in good faith, at the time they drove or caused to be driven into Swain County cattle and sheep and ranged them in Swain County that they had a *bona fide* claim or title to 1200 acres of land in Swain County, then they would have been entitled to range in Swain County 120 head of cattle and sheep, without being liable for the penalty therefor. In this instruction there was error. The question of the defendants' good faith or *bona fide* claim does not enter into the case. In order to justify the defendants in ranging at large their cattle and sheep in Swain County the burden is upon them to show that they own an estate in land in said county for one year or other higher estate. Under the provisions of section 2319 of The Code, if a non-resident owns such an estate in land in said county, then he may bring into the range 20 head of the beasts mentioned in the statute. If he brings in more than 20 head of such beasts to range, then he must show such an estate in 200 acres of land for every additional 20 head which he may turn into the range.

It is contended by the plaintiff that the special proceeding for partition, entitled *Samuel L. Davis et al v. James A. Sparks and others,* under which defendants seek to establish title to certain lands, is null and void for irregularity and so much so that it may be attacked collaterally. We have examined it with care and do not find any grave irregularity in it, certainly nothing that avoids it on the face of the record. Although the summons in the special proceeding is not in the record, it sufficiently appears in the affidavit and order for publication that a summons was issued and that a return was made thereon that the defendants could not be found after due search. The affidavit for publication sets out the return of the sheriff and avers that defendants cannot be found "after due search." This is tantamount to "due diligence." It further states that defendants are non-residents of this State and that they have an interest in the property, the subject of the action and in the jurisdiction of the court. The order of publication is equally full and explicit in its recitals, and it appears that due publication was made of the summons according to law. The notice of publication is set out in the record and it is full and explicit. The land was sold for partition and the purchase money paid by the purchaser, the sale confirmed and deed made to him by Everett, the commissioner, in due form.

We find no defects in the proceeding sufficient to avoid the sale, much less to oust the jurisdiction of the court.

New Trial.

HYATT v. DEHART.

(Filed December 12, 1905).

School Tax—Election — Injunctions — Findings of Fact— Practice.

1. An order dissolving a restraining order, which had been granted until the hearing, against a tax levied by virtue of an election, authorizing a special school tax will not be reversed where the evidence was conflicting and the judge found as facts that one-fourth of the freeholders of the district signed the petition for the election and that a majority of the voters voted in favor of the special tax, and that while there were some irregularities in holding the election and recording the result, they were not of such nature as to vitiate the election.

2. While in injunction cases, the findings of fact by the judge below are not conclusive on appeal, still there is a presumption that the judgment and proceedings below are correct and the burden is upon the appellant to assign and show error.

3. The general rule is that when the injunctive relief sought is not merely ancillary to the principal relief demanded in the action, but is itself the main relief, the court will not dissolve the injunction, but will continue it to the hearing.

4. When, however, the injunction is against the prosecution of enterprises which tend to develop the resources of the country, an injunction to the hearing will ordinarily be refused.

ACTION by H. R. Hyatt against S. A. DeHart, Tax Collector, and others, pending in the Superior Court of SWAIN, and heard by *Judge G. S. Ferguson*, at Chambers in Murphy, September 20, 1905. From an order dissolving the restraining order, the plaintiff appealed.

F. C. Fisher for the plaintiff.
No counsel for the defendant.

CLARK, C. J. This is an appeal from an order dissolving a restraining order, which had been granted until the hearing,

against a tax levied by virtue of an election, authorizing a special school tax, held by virtue of section 72, chapter 4, Laws 1901, as amended by section 24, chapter 435, Laws 1903. The evidence was conflicting. The judge found as facts that one-fourth of the freeholders of the district signed the petition for the election and that a majority of the voters voted in favor of the special tax, and that while there were some irregularities in holding the election and recording the result, they were not of such nature as to vitiate the election or make the collection of the tax illegal.

Ordinarily, the findings of fact by the judge below are conclusive on appeal. While this is not true as to injunction cases, in which we look into and review the evidence on appeal, still there is the presumption always that the judgment and proceedings below are correct and the burden is upon the appellant to assign and show error; and looking into the affidavits in this case we cannot say there was error below.

The general rule is that when the injunctive relief sought is not merely ancillary to the principal relief demanded in the action, but is itself the main relief, the court will not dissolve the injunction, but will continue it to the hearing. *Marshall v. Commissioners,* 89 N. C., 103. But when the injunction is against the prosecution of enterprises which tend to develop the resources of the country, an injunction to the hearing will ordinarily be refused. *Walton v. Mills,* 86 N. C., 280. Certainly, therefore, an injunction to the hearing should be denied or dissolved on the state of facts here found when the relief sought will seriously interfere with the education of the young. There can doubtless be a speedy trial of the disputed issues of fact before a jury, and in the meantime the schools should not be interrupted when the weight of the testimony is found by the judge to be as above stated.

Affirmed.

FRASIER v. GIBSON.

(Filed December 12, 1905).

Cherokee Lands—Terms of Entry—Payment—Forfeitures—Indefiniteness of Entry — Burden of Proof — Statute of Limitations.

1. The manner of entry, terms of payment, etc., of the "Cherokee Lands" are governed by the provisions of chapter 11 of The Code, and section 2766 of chapter 17, providing that the failure to pay the purchase money, within the time prescribed after entry, works a forfeiture, does not apply to the Cherokee Lands.

2. The terms upon which the "Cherokee Lands," when entered, revert to the State, are "in case of failure to pay the whole when due and the money cannot be obtained by judgment" on the bonds, and the enterer has a reasonable time within which to pay his bonds and assert his right.

3. A status is established between the State and an enterer of the Cherokee Lands by which he becomes a purchaser; the enterer of other lands acquires a mere option to buy.

4. Under chapter 11 of The Code, when one entered the "Cherokee Lands," on December 11, 1879, and filed his bonds for the purchase money on February 20, 1880, and paid same December 1, 1884, and obtained grant on August 17, 1885, *held*, the entry had not lapsed.

5. Forfeitures are not favored by the law and when incurred can only be enforced in the manner pointed out in the contract to enforce them.

6. The burden is upon the plaintiff to show that a prior entry was invalid for indefiniteness, for in the absence of any proof to the contrary, the court must assume that the entry and survey conformed to the statute.

7. In an action by one who claims as enterer of "Cherokee Lands," the cause of action is barred in ten years from the registration of the grant.

FRASIER *v.* GIBSON.

ACTION by W. W. Frazier against Franklin Gibson and others, heard by *Judge G. S. Ferguson* and a jury, at the July Term, 1905, of the Superior Court of SWAIN. From a judgment for the defendants, the plaintiff appealed.

Fry & Rowe for the plaintiff.
Bryson & Black for the defendants.

CONNOR, J. This action was disposed of by His Honor below upon a demurrer *ore tenus* to the complaint which disclosed the following facts: On December 11, 1879, defendant J. D. S. McMahan entered in the office of the entry taker of Swain County, 640 acres of land on the waters of Ocona Lufty River in said county, said entry being No. 826; he filed his bonds for the purchase money on the 20th day of February, 1880, and paid same on the first day of December, 1884, obtaining grant numbered 7,294, on August 17, 1885.

On March 15, 1880, one S. Everett, without notice of the McMahan entry, entered in the entry taker's office of said county eight tracts of 640 acres each and filed his bonds for same as required by law. A portion of such entries cover the entry made by McMahan as aforesaid. Said Everett assigned said entries to one D. Lester, who paid the purchase money on June 27, 1883, and took grants for said lands on November 4, 1891—a portion of said grants covering the aforesaid McMahan entry and grant. The defendants Gibson and others claim the land entered by McMahan by virtue of conveyances therefor. The plaintiff is the owner of such right and title as Lester obtained under the grant issued to him. Defendant Frank Gibson is in the possession of said land. That said land is located in that portion of the State to which the statute in regard to the Cherokee lands applies. Plaintiff demanded judgment that the defendants be declared to hold the legal title to said land in trust and that they be decreed to convey the same to him. Defendants, among other defenses,

pleaded the statute of limitations. When the cause came on for trial, defendants relied upon the statute of limitations as a bar to the plaintiff's action and further demurred *ore tenus* to the complaint for that it failed to state facts sufficient to constitute a cause of action and that he was not entitled to the relief prayed for. The court sustained the demurrer and dismissed the action, from which plaintiff appealed.

The defendants claim title, under a senior grant issued upon a senior entry, by which they have a perfect title from the State unless, for the reason assigned by plaintiff, the entry made by McMahan had lapsed at the date of the grant issued thereon. He contends that by McMahan's failure to file the bonds at the time of making the entry and paying them within four years thereafter, the entry, with such rights as accrued therefrom, was forfeited. It will be noted that the entry was made on December 11, 1879—the bonds filed February 20, 1880, and paid December 1, 1884. If, as contended by the plaintiff, the bonds should have been filed within four years from that date, then more than that period elapsed before their payment. If, as contended by defendants, the enterer had three months within which to file them, the same result in respect to time follows, it is therefore immaterial which view we take of that question.

The question is therefore fairly presented whether the failure to make full payment within four years from either date, works a forfeiture of the entry—so that the legal title which vested by the grant is impressed with a trust for the benefit of the Everett entry. This contention is the basis of the plaintiff's action. When we refer to chapter 17 of The Code relating to "Entries and Grants," it is clear that by the express terms of section 2766, which was in force at the date of both entries (Rev. Code, chap. 42), the failure to pay the purchase money within the time prescribed, after entry, works an absolute forfeiture of the entry or, in the language of the statute,

"All entries of land not thus paid for shall become null and void and may be entered by any other person."

The lands in controversy are a portion of the "Cherokee Lands" and in respect to the manner of entry, terms of payment, etc., are governed by the provisions of chapter 11 of The Code. The plaintiff contends that the same rule prevails in regard to the failure to pay the purchase money when due—as in case of other public lands. If he is correct in this, and the McMahan entry of December 11, 1879, lapsed by reason of the failure to pay the bonds when due, then upon the authority of the uniform decisions of this court the entry of Everett of March 15, 1880, followed by the payment of the bonds on June 27, 1883, entitles the plaintiff, succeeding to his rights, to have the defendants claiming thereunder, declared trustees for his benefit and decreed to convey to him the legal title. *Gilchrist v. Middleton,* 107 N. C., 663, in which the authorities are cited.

The defendants, however, contend that no language can be found in chapter 11 of The Code declaring a forfeiture of an entry by reason of the failure of the enterer to pay the purchase money within the prescribed period. This contention invites us to an examination of the statutes compiled in and constituting chapter 11 of The Code, entitled "Cherokee Lands." Without entering into a discussion of this interesting subject by referring in detail to the several statutes enacted by our General Assembly beginning with the Act of 1783, it is sufficient, with some slight exceptions, to the decision of this appeal to note that at the session of 1852 an act was passed, being chapter 119, Code, section 2464, *et seq.,* providing for the entry and purchase of such portions of the Cherokee lands, as had not been sold pursuant to preceding statutes. After providing for the appointment of an entry taker and a scale of prices regulated by the date of entry, it was provided: "It shall be lawful for all persons entering lands in said county of Cherokee to file their bonds, with

approved security, with the entry taker, payable to the State in four equal annual installments which shall, when paid, be in full of the purchase money of the tract or tracts so entered, and, upon proof of such payment as herein provided, the Secretary of State shall issue a grant or grants according to the entry and survey thereon," etc. Section 2466. By the same statute, Code, section 2468, it is provided that all money received from the sale of vacant lands in the counties of Cherokee, Macon and Haywood, shall be paid to contractors for making the Western Turnpike Road, etc. The remaining sections of this act provide for the construction, etc., of this turnpike. At the same session, by chapter 120, section 2, Code, section 2476, it is made the duty of the agent appointed for the collection of the bonds to proceed to collect by suit or otherwise and pay the proceeds over as directed. It will be observed that nothing is to be found in the Act of 1852, chapter 119 and chapter 120, as incorporated in The Code, declaring the effect, upon the rights of the enterer, of a failure to pay the bonds at maturity. We find, however, that in other acts relating to the sale of these lands, it is expressly provided that no grant shall issue until the entire amount of the purchase money is paid. A careful examination of the legislation upon the subject of the Cherokee lands discovers on the part of the State a policy in respect to them different from that adopted in regard to other vacant and unappropriated lands. Prior to 1819 no part of the lands described in section 2346 of The Code (Act 1783) was subject to entry. By Act 1819 provision was made for surveying such portion of said land as was acquired by treaty with the Cherokees and selling, parts of it, at public auction, etc., entries were forbidden and declared void. Purchasers were required to pay one-eighth part of the purchase money in cash and to execute bonds with security for the remainder—payable in installments. No grant was to issue until the amount was paid in full, "and in case of failure to pay the whole when due and

the money cannot be collected by a judgment on the bond, then the land shall revert to the State and be liable again to be sold for the benefit of the State." Section 2356.

In 1836 legislation looking to further sales of the Cherokee lands by commissioners, etc., was enacted. Section 2402 (Act 1836) makes the same provision for collecting the bonds as *section 2356*. Provision is made in several other acts for bringing suit on the bonds, etc. It was not until 1852 that any portion of these lands were open to entry and then, as we have seen, the enterer was required to give bond with security, etc.

Reverting to the legislation regarding other public lands, we find an entirely different plan and policy outlined. Subject to certain exceptions, any citizen of the State may enter the public lands as provided by statutes enacted at different dates and incorporated in chapter 17 of The Code. By the provisions of these statutes no contract is entered into with the State to buy the land entered nor does the State assume any other obligation than to secure to the enterer a right or option to pay the amount and call for a grant within the period fixed. In *Hall v. Hollifield,* 76 N. C., 476, it is said: "The public lands of the State are open to entry by any of its citizens, and the first declaration of intention is made on the books of the entry taker in the county where the land lies, and this gives priority, called a pre-emption right. No estate or interest in the land is thereby acquired. No consideration is paid and none of the requisites for that purpose are performed, but simply the right to be preferred when the money is paid and the other formalities required by the statute complied with." A mere enterer is not entitled to an injunction to restrain another claimant from cutting timber. *Newton v. Brown,* 134 N. C., 439. A status is established between the State and an enterer of the Cherokee lands by which he becomes a purchaser; the enterer of other lands acquires a mere option to buy. In the first instance, he enters into a

contract with the State obligating himself, with approved security, to pay for the land, in four equal annual installments—giving his bond therefor—in the other he is a mere proposer assuming no obligation and acquiring no other right than a preferred bidder—an option to take the land or not as he sees fit, or as it may be to his interest. This difference shows clearly why the language of section 2766 is not found in any of the statutes relating to the sale of the Cherokee lands. The relation in respect to the purchase of these lands between the State and the enterer or purchaser, is that of vendor and vendee, with all of the rights and equities incident thereto. The distinction between the several statutes is recognized by this court in *Kimsey v. Munday*, 112 N. C., 816. In that case it is said by *MacRae, J.*, that the enterer should within a reasonable time pay the bonds and call for his grant, or he would be presumed to have abandoned his claim. No time was fixed by the court; it was held that thirty years was unreasonable.

It would seem that by analogy to contracts between individuals, the period fixed by The Code, ten years, would be reasonable. We are therefore of the opinion that by a correct construction of chapter 11 of The Code, considering it as one act, the entry made by McMahan, under which defendants claim, had not lapsed at the date of the grant. The terms upon which the land would revert to the State are stated in the statute to be "in case of failure to pay the whole when due and the money cannot be obtained by judgment on their bonds." This condition could not have existed because within a short time after maturity, the bonds were paid. Forfeitures are not favored by the law, and when incurred can only be enforced in the manner pointed out in the contract to enforce them. The plaintiff insists that notwithstanding this view he is entitled to relief because the demurrer admits that Everett had no notice of the McMahan entry when he made his entry. We understand the allegation to be that he had no actual or express

notice, because upon the facts alleged the entry followed by the survey was constructive notice. Neither the entry nor grant are in evidence. The plaintiff's counsel, in his well considered brief, says that the entry is too indefinite to constitute notice. We are not able to say how this is—but in the absence of any proof to the contrary, we must assume that the entry and survey conformed to the statute in this respect. The burden was upon the plaintiff to show that the entry was invalid for indefiniteness. The defendants pleaded the statute of limitations, which we held in *Ritchie v. Fowler,* 132 N. C., 788, barred an action of this kind in ten years from the registration of the grant. The question has been again discussed before us at this term, and that case, after full consideration, approved. *McAden v. Palmer,* at this term.

The grant under which defendants claim was issued and recorded in 1883. This action was instituted January, 1903. This is a striking illustration of the wisdom of the statute. The welfare of the State demands that within a reasonable time titles to land shall be protected from litigation. For some reason the plaintiff waits nearly eighteen years after the public records give him notice that the defendants' grantor have a grant from the State for this land. Viewed from either aspect, we concur with His Honor that the plaintiff cannot recover.

The judgment must be

Affirmed.

WHITAKER v. COVER.

(Filed December 15, 1905).

Deeds and Grants—Calls—Descriptions—Number of Acres.

1. When the line of another tract of land which is known and established is called for in a grant or deed, it will control a call by course and distance.

2. Ordinarily, the number of acres mentioned in a deed constitutes no part of the description, especially when there are specifications and localities given by which the land may be located.

ACTION by W. T. Whitaker against S. E. Cover and others, heard by *Judge G. S. Ferguson* and a jury, at the August Term, 1905, of the Superior Court of CHEROKEE, upon the following case agreed:

"W. T. Whitaker sold and conveyed to S. E. Cover *et al* a certain tract of land in Cherokee County, containing, as shown by State grant No. 3632, 640 acres, at the price of $3 per acre. The calls in said State grant are as follows: Beginning on a chestnut tree standing in the line of number 69, and runs west 260 poles to a stake; then north 320 poles to a stake; then east 320 poles to a stake; then with the line of No. 2229 south 320 poles to the southwest corner of said number on the line of number 69; then with that line west 60 poles to the beginning. From the third corner running east 320 poles to a stake and then south with the line of No. 2229, would increase the distance 93 poles, and the acreage from 640 to 820 acres.

"W. T. Whitaker insists and contends that the line running east must go to the line of 2229, and then with that line south, and that said S. E. Cover *et al* are due and owing him $3 per acre for all lands in excess of 640, which said State grant calls for; and that the State grant covers and will hold the land to number 2229.

"S. E. Cover *et al* contend that the east line calling for a stake, but not in the line of No. 2229, must stop when the 320 poles are reached at the stake, and that by stopping at the end of the call in the east line and running south to the line of No. 69 and then 60 poles to the beginning corner, gives the complement of 640 acres called for in the grant.

"A plat and certificate of said land is hereto attached and made a part of this case agreed.

"The parties agree that if the east line should be extended to the line of No. 2229 and, if the court so decides, S. E. Cover *et al* will owe W. T. Whitaker for all land in excess of 640 acres called for in the State grant, $3 per acre. If the court decides that the east line stops at the end of 320 poles, then S. E. Cover *et al* will owe W. T. Whitaker nothing, having paid Whitaker for 640 acres." Judgment was given for the plaintiff and the defendants appealed.

R. D. Gilmer, Ben Posey and *J. D. Mallonee* for the plaintiff.

E. B. Norvell and *Axley & Axley* for the defendants.

WALKER, J., after stating the case: The only question in this case is, whether the line described as running "east 320 poles to a stake" should stop when the distance gives out or should be extended to the line of patent No. 2229, the next call being "then with the line of No. 2229 south 320 poles to the southwest corner of said number on the line of number 69." We have no doubt as to what our answer to this question should be. The affirmative of the proposition has been settled by a long and, we think, unbroken, line of precedents in this State. Counsel for the defendant have called our attention to *Brown v. House,* 116 N. C., 859, and they contend that it marks a distinct departure from this established doctrine. If there were any irreconcilable conflict between the decision in *Brown v. House* and what we now

decide, we should refuse to follow it, but an examination of that case will disclose that the court recognizes the settled rule to be that the general calls in a grant or deed control in locating the land described in the instrument, subject, however, to the exception that when a natural object or monument is also called for and can be identified and located, it will control a call by course and distance. It is added, that the courts have held that the line of an adjacent tract, if known and established at the date of the execution of the grant or deed, will have the same effect. We have given substantially the language there employed. The court, however, thought that the call, then under consideration, namely, "South 360 chains to a stake supposed to be Stokeley Donelson's line, thence with his line east 390 chains to his northeast corner," was not within the well known exception just stated, as it was too vague and uncertain to control the course and distance, and stress was further laid upon the fact that the line was only 360 chains long, whereas, if extended in order to reach Donelson's line, a mile and a quarter must be added to its length. Whether these reasons are cogent enough to take even that case out of the exception, we need not say, as there are no facts in this case of the kind which influenced the court in reaching its conclusion in that case. Here the call is a positive as well as a definite one, and the excess of distance only 94 poles in the third line, if we go to the line of tract No. 2229, and besides that line is an established one and was actually located by the surveyor, as appears by the annexed plats and field notes. Upon this showing, it is not necessary to disturb *Brown v. House,* as our case comes clearly within the exception. But the learned counsel confidently relied on *Harry v. Graham*, 18 N. C., 76, as showing that this case is not governed by the exception. The call in that case was, "running north 45 degrees west 220 poles to a black oak, *near* his (the grantee's) own line." If the black oak could not be found, nor its locality proved,

it was held that the word "near" would not carry the line 30 poles further to reach another tract belonging to the grantee, but that it must be stopped at the end of the distance mentioned in the grant. The court in that case also recognizes the exception to the general rule that calls for the line of another tract will control course and distance and intimates that it would have been applied to the call of the grant then being construed, notwithstanding the use of the word "near," if the next preceding call in the grant had not enabled the surveyor to fix with certainty the place where the black oak once stood, it being N. 45 degrees W. 220 poles from a chestnut and red oak, which were found. The call for the grantee's line was not, therefore, the more certain one. That case, instead of militating against the position we take, is, we think, a direct and strong authority in support of it. In *Haughton v. Rascoe,* 10 N. C., 21, the call was "N. 12 E. 530 poles, then along the thoroughfare," and it was held, as a matter of course, and without discussion, that the line should be extended (beyond the distance given) to the thoroughfare. *Judge Gaston,* who argued the case for the defendant, seems not to have contested the point. The deed in *Sandifer v. Foster,* 2 N. C., 237, contained this call: "Thence south to a white oak, thence along the river to the beginning." The court decided, according to what it said had been "uniformly held in our courts," that the river was the boundary, although the distance gave out before reaching that object and the white oak stood half a mile from the river. The call of the grant in *McPhaul v. Gilchrist,* 29 N. C., 169, was "N. 87 W. 199 poles to a hickory, thence the courses of the swamp to the beginning," and the court held that though the distance from the last corner to the swamp was greater by 9 chains and 50 links than that given in the grant, and though there was no hickory to be found, and no proof of its existence, yet the line should go to the swamp and thence pursue its courses. To the same effect are the

following cases: *Pender v. Coor,* 1 N. C., 228; *Prest. of Lit. Fund v. Clark,* 31 N. C., 58; *Hartsfield v. Westbrook,* 2 N. C., 258; *Cherry v. Slade,* 7 N. C., 82; *Hays v. Askew,* 53 N. C., 226; *Gause v. Perkins,* 47 N. C., 222; *Baxter v. Wilson,* 95 N. C., 137. In *Corn v. McCrary,* 48 N. C., 496, *Pearson, J.,* uses language which has a strong bearing upon the facts of this case: "The line of another tract which is called for, controls course and distance, being considered the more certain description, and it makes no difference whether it is a marked or an unmarked, or mathematical line (as it is termed in the case), *provided it be the line which is called for.* In deciding whether it be the line called for, the fact of its being a marked line, may have an important bearing; but in our case it is assumed to be the line called for, which disposes of the question." And later, in *Graybeal v. Powers,* 76 N. C., 66, the same learned judge, speaking for the court, reaffirms the principle that whenever the line of another tract is called for, whether it be a marked or a mathematical line, the course must be disregarded, if the line, so designated as the end of the call, is sufficiently established. In *Campbell v. Branch,* 49 N. C., 313, *Battle, J.,* for the court, said: "The description about which there is the least liability of error, must be adopted, to the exclusion of the other. It is equally well settled that the call for the line of another tract of land, which is proved, is more certain than, and shall be followed in preference to, one for mere course and distance." The subject is fully treated in *Rowe v. Lumber Co.,* 133 N. C., 433, and in *Hill v. Dalton,* and *Fincannon v. Sudderth,* at this term. Wherever the principle has been held not to affect a call by course and distance, it will be found to be due to some peculiarity in the facts which rendered inapplicable the reason upon which it is based, namely, that an uncertain description should yield to one which is certain and less liable to disappoint the intention of the parties.

The difference in the quantity of the land, or the number

of acres, if the call is stopped at the end of the distance and if extended to the line of lot No. 2229, cannot be allowed to prevent the application of the principle embodied in the exception to the general rule requiring the land to be located according to the primary calls of the deed, the exception being, "unless there are others more certain." "Ordinarily, the number of acres mentioned in a deed constitutes no part of the description, especially when there are specifications and localities given by which the land may be located, but in doubtful cases it may have weight, as a circumstance in aid of the description, and in some cases, in the absence of other definite descriptions, may have a controlling effect." *Harrell v. Butler,* 92 N. C., 20; *Baxter v. Wilson, supra.*

There was no error in the judgment of the court upon the case agreed.

Affirmed.

PLEMMONS v. RAILROAD.

(Filed December 15, 1905).

Executors and Administrators—Bond—Collateral Attack—Railroads — Negligence — Lying Across Track — Evidence.

1. In an action by an administratrix to recover damages for the alleged negligent killing of plaintiff's intestate, a motion to dismiss the action because the administratrix had not given an administration bond at the time the letters of administration were issued, was properly overruled, as the issuing of the letters cannot be collaterally attached in this action.

2. In an action to recover damages for the negligent killing of plaintiff's intestate, where the evidence tends to prove that the intestate was run over by the defendant's train in its yard at night; that he was lying across the track unconscious; that the track was straight for a distance of 100 yards or more; that the headlight of the locomotive was burning; that the train was running slowly and was stopped within 80 feet after striking intestate, and that the engineer or fireman either saw the object lying across the track, or could easily have done so, for a distance of 100 yards or more, *held*, that the judge properly submitted the issues to the jury.

ACTION by Maggie Plemmons, Administratrix of B. M. Plemmons, against Southern Railway, heard by *Judge T. A. McNeill* and a jury, at the September-October Term, 1905, of the Superior Court of BUNCOMBE.

This is an action to recover damages for the alleged negligent killing of plaintiff's intestate. The court submitted the following issues: "1. Is the plaintiff the duly qualified administratrix of B. M. Plemmons, deceased? Answer. Yes. 2. Was the plaintiff's intestate killed by the negligence of the defendant as alleged in the complaint? Answer: Yes. 3. Did said intestate, by his own negligence, contribute to his own death? Answer: Yes. 4. If so, could the defendant, notwithstanding the negligence of the deceased, have avoided

his death by the exercise of proper care and caution? Answer: Yes. 5. What damages, if any, is the plaintiff entitled to recover? Answer: Fifteen hundred dollars."

From the judgment rendered, the defendant appealed.

Julius C. Martin for the plaintiff.
Moore & Rollins for the defendant.

BROWN, J. (1) The defendant requested the court to dismiss the action because the administratrix had not given an administration bond at the time the letters of administration were issued. The issuing of the letters cannot be collaterally attacked in this action. If the clerk of the Superior Court issued the letters in violation of the statute without requiring the proper bond, he should revoke them at once of his own motion, or upon the application of anyone interested in the intestate's estate. Until he does so, and for any *devastavit* in the interim, the clerk's official bond is undoubtedly liable. For the purpose of this action His Honor's ruling on the first issue is correct.

(2) The defendant asked the court in apt time to nonsuit the plaintiff upon the ground that there was no sufficient evidence tending to prove that the intestate was killed by the negligence of the defendant. There is evidence tending to prove that the intestate was killed by the negligence of the defendant. There is evidence tending to prove that the intestate was run over by the defendant's train in the yards of the defendant in Asheville on the night of November 25, 1900; that the intestate was lying across the track unconscious; that the track was straight for a distance of some 300 feet or more; that the headlight of the locomotive was burning; that the train was running slowly and was actually stopped within about 80 feet after striking the man. There was evidence tending to prove that the engineer or fireman

either saw the object lying across the track or could easily have done so, to the distance of 100 yards or more.

We have examined the evidence carefully, and under the decisions of this court, in similar cases, the judge below properly submitted the issues to the jury. *Clegg's case,* 133 N. C., 304; *Upton's case,* 128 N. C., 173, 176; *Lloyd's case,* 118 N. C., 1010, 1014; *Pickett's case,* 117 N. C., 616, 639.

We find no error in the record.

Affirmed.

LEDFORD v. EMERSON.

(Filed December 15, 1905).

Partnership—Options—When Actions at Law Maintainable —Arrest and Bail—Fraud.

1. During the continuance of a partnership, one partner cannot sue another on any special transaction which may be made an item of charge or discharge in a general partnership account.

2. One partner, during the continuance of the partnership, cannot ordinarily bring trover or trespass against the other by reason of acts concerning partnership property, unless the same be destroyed or removed entirely beyond the reach or control of the complaining party.

3. Where a partnership has terminated and all debts have been paid and the partnership affairs otherwise adjusted or where the partnership was for a single venture or special purpose which has been closed, and nothing remains but to pay over the amount due, in either case an action will lie in favor of one against the other.

4. Where an action at law will lie by one partner against another, if the facts bring the claim within the provisions of our statutes on arrest and bail, the plaintiff is entitled to this ancillary remedy.

5. When the plaintiff sues to recover his share arising from a sale of certain options on land, which the plaintiff took in the name of the defendant under an agreement that the defendant was to advance the incidental expenses, sell the options and divide the profits equally, it was error to discharge an order of arrest of the defendant allowed upon proof of fraud on his part in connection with the sale of the options.

ACTION by J. P. Ledford against A. S. Emerson, pending in the Superior Court of CHEROKEE, and heard by *Judge W. H. Neal,* on October 27, 1905, upon a motion to set aside an order of arrest and relieve the bail.

The principal action was instituted in July, 1903, to recover plaintiff's share arising from a sale of certain options on land situated in north Georgia, same having been procured by plaintiff in the years 1900, 1901, etc., and sold by defendant in April, 1903, at a price of $10,000. The allegation and testimony of plaintiff tended to show that plaintiff procured a large number of options on land in north Georgia, took same in the name of defendant under an agreement that defendant was to advance the incidental expenses, sell said options and divide the profits equally with the plaintiff; that defendant, having sold said options at the price of $10,000, fraudulently concealed the facts from plaintiff, paid plaintiff $250, which plaintiff took under false and fraudulent assurances as to the disposition of the options, giving defendant his receipt in full, and defendant had failed to make any other or further payments to plaintiff by reason of said deal, etc.

As ancillary to the principal action, an order of arrest was issued in the cause on affidavits duly made on February 15, 1904, and defendant was arrested thereunder and held to bail. There was a motion to discharge the order of arrest. Motion allowed and plaintiff excepted and appealed.

Axley & Axley, E. B. Norvell and *Busbee & Busbee* for the plaintiff.

Ben Posey and *Dillard & Bell* for the defendant.

HOKE, J. The judge below on the hearing, found the facts contained in the plaintiff's affidavits to be true, and held, as a matter of law, that on these facts, there was no right shown to arrest the defendant. His Honor thereupon discharged the order of arrest and entered judgment exonerating the bail from any and all liability by reason of his suretyship.

This, as we understand, was on the idea that the facts disclosed a case of partnership, and in such case, there was no legal right in one partner to cause the arrest of another.

It is a well recognized principle that during the continuance of a partnership, one partner cannot sue another on any special transaction which may be made an item of charge or discharge in a general partnership account. This has sometimes been put on the ground that such a suit would necessitate that the party complained of should be both plaintiff and defendant. But I apprehend a reason of more moment is that as to such a transaction, till a full accounting is had, it cannot be ascertained or declared what portion of such claims belong to the one or the other; and so it is true that one partner, during the continuance of the partnership, cannot ordinarily bring trover or trespass against the other by reason of acts concerning partnership property, unless the same be destroyed or removed entirely beyond the reach or control of the complaining party, for one has no more right to deal with the property than the other. Where, however, the partnership has terminated, and all the debts having been paid and the partnership affairs otherwise adjusted, nothing remains to be done but to pay over an amount due from one to the other, to be ascertained by a reckoning as to one special item or even several items—the matter presenting no complication of any kind—as in *Clark v. Mills*, 36 Kansas, 393; or where the partnership was for a single venture or special purpose which has been closed, and nothing remains but to pay over the claimant's

share of the proceeds, as in *Jacques v. Hulitt,* 16 N. J. Law, 38—in either case, an action would lie in favor of one against the other. George on Partnership, 304; Bales on Partnership, 865, 866; *Clark v. Mills,* and *Jacques v. Hulitt, supra; Musier v. Trumpbour,* 5 Wend., 274; *Moran v. LeBlanc,* 6 La. Ann., 113; *Wheeler v. Arnold,* 30 Mich., 304.

In *Clark's case, supra, Holt, P. J.,* for the court, said: "There were no debts to be paid, no money to be collected, no property to be disposed of; and under the facts of the case it was purely a pecuniary demand involving no complications that could not properly be determined in a justice's court.

In *Wheeler v. Arnold, supra,* it is held: "The remedy at law for contribution between two partners after dissolution is admissible, and when there have been no such dealings with assets and no such private relations with the firm as to make a settlement difficult, there would be no occasion, under our statutes making discovery obtainable at law by an examination of parties as witnesses, for an accounting in equity."

In *Jacques v. Hulitt, supra,* it is held: "A mutual covenant to divide the proceeds of a certain crop, if it be a partnership, is so only for a special purpose and terminates as soon as the crop is sold; and an action lies by one of the parties against the other for any balance due thereon to the plaintiff from the defendant without resorting to the action of account render."

This being the correct doctrine, and an action at law maintainable, if the facts bring the claim within the provisions of our statutes on arrest and bail, no reason occurs to us why the plaintiff should be deprived of this ancillary remedy. The statute (Code, section 291, sub-section 4,) provides that when a defendant has been guilty of fraud in contracting the debt or *incurring the obligation* for which action is brought, or for concealing or disposing of property, or to recover damages for fraud or deceit, an order for arrest may be

issued; and it has been held in *Powers v. Davenport,* 101 N. C., 286, that such an order is proper when there has been fraud committed after contracting the debt, as by concealing property or other devices for defeating the creditor.

Here is allegation and ample evidence to sustain it, charging intentional fraud throughout the entire transaction on the part of the defendant and the judge below has found that these charges are true: a fraudulent design in having the options drawn in the name of the defendant; a fraudulent effort and purpose in concealing the sale from the plaintiff; false and fraudulent statements in procuring from the plaintiff a receipt in full, etc. We must not be understood as holding that no right of arrest can ever exist where the partnership has terminated and the affairs are so complicated that, in order to a proper settlement, an action in the nature of a bill in equity for an account is required. We have only elaborated the position that the right of arrest may exist when an action of law would lie with a view of confining the decision to the points required by the facts of the case before us. The court is referred to the case of *Soule v. Hayward,* 1 Cal., 345, as authority supporting the defendant's position, but this was a case construing the California statutes, that a partner was not included under the term "agent" in their statute on arrest; and the propositions here discussed do not seem to have been presented or considered by the court.

There was error in allowing the defendant's motion, and the order to that effect will be set aside.

Error.

MOORE v. BANK.

(Filed December 15, 1905).

Malicious Prosecution—Probable Cause—Question for Court —Evidence—Attachment.

1. In an action for malicious prosecution in suing out an attachment, justifiable probable cause is a belief by the attaching creditor, in the existence of facts essential to the prosecution of his attachment founded upon such circumstances as supposing him to be a man of ordinary caution, prudence and judgment, were sufficient to induce such belief.

2. When the facts are admitted, it is the duty of the court to declare, as a question of law, whether there is probable cause.

3. Those facts and circumstances alone which were known to defendant at the time of the affidavit upon which the warrant of attachment was based are to be considered in determining the question whether he had probable cause.

4. Evidence that plaintiff was indebted to defendant bank in a large amount which was unsecured and had been running for a long time, and though urged to do so, plaintiff had made no payment thereon; that he had withdrawn his account from the bank; that the bank knew of plaintiff's litigation with his wife and its disastrous effect upon his business and property, plaintiff having informed the bank that he owed $20,000 and had property enough to pay for it, "but he feared such would not be the case long;" that his property was encumbered with mortgages for $5,000.00 and with an inchoate dower right and a pending claim for alimony for $4,000.00; that plaintiff had sold nearly all of his personal property, had dismantled and shut down his mill, leased his store for two years, left the entire property uninsured and had gone to a distant State, *held*, that these facts constituted probable cause for attaching plaintiff's property.

5. The fact that the plaintiff owned a large quantity of real estate of large value is not material upon the question of probable cause.

ACTION by J. H. Moore against the First National Bank of Statesville and Geo. H. Brown, heard by *Judge Jas. L.*

Webb and a jury, at the February Term, 1905, of the Superior Court of ALEXANDER.

This was an action for damages alleged to have been sustained by reason of suing out an attachment by defendant bank and George H. Brown, its cashier, against plaintiff's property, wrongfully, maliciously and without probable cause. A demurrer to the plaintiff's evidence was sustained by the court and the action dismissed. The facts developed upon plaintiff's evidence, in so far as they are material to the decision of the appeal, are: The defendant bank is a banking association duly organized pursuant to the National Banking Laws and was, at and before the date of the transactions set out in the complaint, engaged in the banking business in the city of Statesville. The defendant Brown was, at said dates, cashier of said bank, charged with the duties incident to his office. Plaintiff was, on the 5th day of June, 1903, and had been for some time prior thereto, indebted to defendant bank in the sum of five thousand, one hundred dollars—said indebtedness was evidenced by several notes executed at different dates during the year 1901, and two notes during 1902, some of said notes running thirty days and some ninety days. Interest had been paid from time to time. Several of them were overdue on June 5, 1903. The defendant bank had no security to the said indebtedness. The bank had, during the year 1903, frequently urged the payment of the notes, but no payment had been made on them. Plaintiff was in June, 1903, a resident of Liledoun, Alexander County. He was a physician, but was, at the date of the transactions referred to, engaged in operating a cotton mill, flour mill and farming, etc., conducting a store in connection with his mills. He owned June 5, 1903, a roller flour mill and corn mill at Hickory in Catawba County, known as the Allspaugh Mills, also the Allspaugh Farm of 287 acres, worth in all $8,000. He owned at Liledoun a cotton mill and other real estate, estimated to be worth

$45,000. There was a mortgage on the Alexander property of about $2,500. He owned the Watts Farm of 350 acres, upon which there was a mortgage of $2,500 for the purchase money. According to plaintiff's estimate, his property was worth at a forced sale, $53,000, and his indebtedness was $20,000. He was involved in a divorce suit with his wife in which she was claiming alimony, and had filed a notice of *lis pendens* in the county of Alexander. There was evidence tending to show that plaintiff owned property in Kentucky of considerable value. He had in his mill at Liledoun $10,000 or $12,000 worth of "duck goods," the product of his mill, which he had sold and for which he had received New York exchange. Prior to June, 1903, plaintiff had kept an account, depositing large sums of money, in defendant bank, but had ceased to do so during the month of April, 1903, after which time the deposits did not amount to much. He was on June 5, 1903, solvent.

Plaintiff's litigation with his wife was giving him anxiety and annoyance. Motion was pending for further alimony *pendente lite,* $4,000 having been allowed and paid. The reason assigned by plaintiff for ceasing to keep his account with defendant bank was the fact that the attorney for the bank had been employed by his wife in her suit with him and that he did not deem it safe to have his business known to them. On May 21, 1903, plaintiff sent to defendant Brown, cashier, a letter in which he stated that he felt he owed a duty to his creditors, he being one of them, to make a plain statement concerning his business and to afford him the means of realizing the amount of his debt in full. That he, Brown, had trusted him and he did not propose that he should lose a cent by reason of his confidence. That if he would take the prompt action as he, plaintiff, suggested, he would sustain no loss. That prior to two years before this, his business was on a firm basis and he was making money; that his obligations were met promptly and he looked forward with

hope to a successful business future. That, at that time, his wife, from whom he had separated several years before, had returned from California and instituted suit against him on groundless charges. That he had been harassed by motions for alimony *pendente lite;* had paid her $4,000 besides cost and attorney's fees—that he had been unable to procure a trial of the case and had exhausted every effort to obtain a reasonable settlement; that he had no assurance when the cause would be tried. Meanwhile she was clamoring for more alimony and that costs and expenses were accumulating. That after July 1 another motion for alimony could be made and he had no doubt that it would be; that it might result in another heavy financial loss to him; that he had lost heavily in sums actually paid out; that he had not been able to give to his business the proper attention. That he was indebted to the amount of $20,000 and had property enough to make every obligation good, saying: "But with the continuance of this suit, its heavy demands upon my time and resources, its disturbing and harassing influence upon my mind, I fear that such will not be the case long." He stated that he wished to protect his creditors while he had the means with which to do so. That he did not wish to enter bankruptcy, because he was not a bankrupt; if he left his creditors to sue, obtain judgment and levy execution and resort to other process the assets would be consumed in court, etc. He proceeded to make a proposition to convey his property to two trustees, one selected by himself and one by his creditors—both to give bond, etc., to sell and pay his creditors. He requests the defendant to act promptly in the matter signifying acceptance and taking the steps necessary to carry into effect his proposition. This letter was sent by plaintiff to his other creditors who were willing to accept his proposition. Sometime during the months of February and March, 1903, plaintiff sold some horses, mules and cattle—he sold other stock in May, and on the 18th day of said month sold

his stock of goods for $3,300, for which he received $2,000 cash and notes for balance—leased his store house for two years—sold his growing crop of cotton on hand and shut down his mill. On or about May 26, 1903, plaintiff left his home and went to the city of Cincinnati for the purpose of attending the sale of some property belonging to his children. He stated in Sunday school that he was going and would be away some two or three weeks. He caused to be sent to his nephew, Mr. Payne, in Cincinnati, from the proceeds of his property sold, about $8,000, which was deposited in bank to his, Payne's, credit. This was not known to Brown on June 5, 1903. There was much testimony in regard to plaintiff's property and his movements subsequent to the issuing of the attachment.

Plaintiff introduced his son, Ernest V. Moore, who testified that he saw defendant Brown at Taylorsville two days prior to the date of the attachment. He testified as follows in regard to conversation with defendant: "I came up on the train from Statesville—had been to Hickory; I got into a buggy; was about to drive away when I saw Mr. Brown. I had the buggy stopped—Mr. Brown spoke to me and shook hands with me, and made some remark—asked where my father was; told him that my father was out of town, and he made the remark that he wished to see me. I got out of the buggy and went back to the Campbell boarding house; Mr. Brown asked me again, I think, where my father was, and I told him he was in Cincinnati; he told me that a report had come to him of the sale of certain property; I told him that Mr. Deal could give him all the information regarding that property, and that he could see him at the mill. We secured a buggy and, at his request, drove to the mill, about three miles; on our way out we talked about the situation; he explained that the money had been loaned by the bank, and that he was very anxious about it; I told him that I realized that, and also that he need have no anxiety concern-

ing it; that we were immediately expecting a trial of the divorce proceedings then pending; that a special term of court had been ordered by the Governor in Catawba County for the purpose of trying this case, and it would come up in July—first of July, and that the case would then unquestionably be settled; explained to him that he had practically exhausted his credit on the property on account of these divorce proceedings, and that at the present time it was impossible for us to make payment of the notes then due or about to be due; he seemed to be very well satisfied with what I had said, and when he reached the mill he made inquiry concerning the insurance on the property; I told him my impression was it was insured for $40,000; we made search for the policies and found several, but all the policies which we were able to locate were old policies and had been cancelled; Mr. Brown seemed very anxious about it and wished to know definitely about it, and I told him that the only way I could find out was to write my father, which I promised to do and let him know immediately I heard; he then requested me to take him through the cotton mill; he examined the machinery thoroughly and made notes of some sort, and questioned me as to the price of it; I informed him that the mill originally cost between $40,000 and $50,000, including the machinery; we went entirely through the mill; examined the water power and the engine, and just as we stepped out the mill Mr. Brown said there is no question about this being a good mill; I took him through the roller mill; it cost between $3,500 and $4,000. I offered to take him up about one-half mile above the place to show him the shoal, and he said he did not care to go; we went back into the store; he went and questioned Mr. Deal; I don't know what he said to Mr. Deal; very shortly afterwards we drove back to town. Driving back to Taylorsville he said to me, Why did your father sell the property at Liledoun? I went into this detailed statement, which might have been made

some parts at other times; this was the substance of the statement I made to him at different times on that trip. I stated that for the past two or three years we have been harassed by divorce proceedings; motions for alimony have been made at eight or nine different times; at one time there was a judgment and an order from the Superior Court of this State for $4,000 to be paid in 90 days; an appeal was taken on that order; and there were other matters in the court; at least, my father was threatened with contempt proceedings and threatened with jail for failing to pay it, but the amount was paid; I stated the business here has been dull and all the running capital practically has been withdrawn from the mill to meet the expense of litigation; in addition to this he has bought and paid for, to a great extent, the roller mill in Hickory; which also took a great part of his capital; that capital which I speak of was the running capital of the mill at Liledoun; I explained to him that the litigation had been protracted, but a special term of the court had been ordered, and we were expecting a trial in July and beyond all reasonable doubt a trial would be had; in addition to a trial we were expecting a further motion for alimony, and that the sale of the property had been for the exclusive purpose of obtaining money to meet the expenses of the litigation, and to pay any possible judgment for alimony, and to run his business which was then standing still for lack of funds; Mr. Brown seemed to be satisfied; he had previously stated that he had always been a good friend to this concern; I said that was true; he said that he was my father's friend, and when he said he was he was, and he had no desire in the world to injure him; I told him I believed that; he told me that he knew the attorneys and the plaintiff in the divorce proceedings were doing everything in their power to ruin him, and if possible would ruin him, and in all the trouble that had preceded he had advanced the money with which to run the business, and had done it willingly; he said now he was

anxious and wanted the money back—wanted the debt paid off; I told him that the most earnest desire we had was to pay every obligation we had; every move we made was to protect our creditors; that the sale of such personal property as had been sold was for the purpose of meeting all the requirements of the court in the matter then pending. After we reached Taylorsville I left him at the bank in conversation with Mr. McIntosh and Mr. Matheson; Mr. Brown was very much concerned because he could see no insurance on the property at Liledoun; I told him, however, that I would look into the matter at once and let him know as soon as I could; he said that he thought Dr. Moore should, for his own protection and the protection of his creditors, keep his property insured; $50,000 of property with not a cent of insurance on it; I may have stated again I would write to my father about it. While we were at Liledoun Mr. Brown again asked me where my father was; I told him he had gone to Cincinnati and was going to Columbus for a day or so; I said I would be very glad for him to write him about the matter; I took a piece of paper and wrote his address in Cincinnati and in Columbus, telling him I was not certain as to just which place he would be when his letter should arrive; I said if you write duplicate letters to him at these addresses they will be delivered in due course of mail, and gave him the addresses. I told him further, I will write to him and will let him know immediately I hear from him concerning the insurance; he said when will he be back? I said, if he is not on his way back he will be here the first of the week; he said, what is he gone for? I said, to look after some property belonging to us children in Cincinnati; he has an order of court authorizing a sale of this property and has gone for the purpose of trying to effect a sale; he urged me on the matter as to his return, and I repeatedly restated these facts. I questioned him as to what course he was about to pursue; he made a statement here in Taylorsville just out-

side the Bank of Alexander in the middle of the street just before he went to the train that he had no course in view; nothing to act upon; I said, whatever course you have in view don't take any action until Monday; I said my father will certainly be here Monday; he said, he will certainly return Monday? I said he will undoubtedly return Monday; Mr. Brown smiled and said all right. He returned Monday; I don't recall anything further."

On June 5, 1903, defendant bank instituted an action against plaintiff for the recovery of said indebtedness. For the purpose of obtaining a warrant of attachment, the defendant Brown made an affidavit setting forth the cause of action and averring that plaintiff had sold and disposed of the property described and was then offering for sale other valuable property, "all of which said defendant has done with intent, as affiant is informed and believes, to defraud his creditors." That plaintiff had departed from the State with, as affiant is informed and believes, intent to defraud his creditors. A warrant of attachment was issued upon said affidavit and duly levied by the sheriff of said county upon plaintiff's property on June 6, 1903. Plaintiff, through his counsel, gave notice on July 25, 1903, that he would move the court at a time and place named to dissolve the attachment. At the August Term, 1903, an order was made reciting the said motion and that "the defendant having averred in his answer his willingness and ability to pay off the indebtedness due plaintiff upon dissolution of the attachment, and having exhibited a certified check to the court payable to the plaintiff as evidence of his good faith, it is ordered that the said attachment be dissolved and thereupon said check delivered to the plaintiff." Thereafter an order was made taxing defendant bank with the cost. There was evidence that plaintiff had advertised his property for sale. It is not clear whether defendant Brown had knowledge of this at the time he sued out the attachment. At the close of plaintiff's evidence, defendant moved for judgment

as upon nonsuit. Motion allowed. Plaintiff excepted and appealed.

Armfield & Turner, R. Z. Linney and *Hufham & Williams* for the plaintiff.

Furches, Coble & Nicholson and *W. P. Bynum, Jr.,* for the defendant.

CONNOR, J., after stating the case: We are relieved of any extended discussion of the principles of law applicable to this appeal. The learned counsel for plaintiff and defendants agree in that respect. Plaintiff's counsel cite a line of cases decided by this court which clearly and without any variation settle the law as to the material questions in the case. We are not called upon to express any opinion in regard to the conduct or motives of plaintiff except in so far as they bear upon the state of defendant's mind and the reasonableness of his belief. It may well be, and we do not wish to be understood as intimating any opinion to the contrary, that he was acting in all that he did, in perfect good faith and with honest intentions. It is evident from his testimony that the long and harassing litigation with his wife had, as it was well calculated to do, seriously disturbed his mind and embarrassed his business.

The question is whether the defendant Brown had probable cause to believe that plaintiff was moved by any other than an honest purpose in his conduct. The essential averment to be established before the plaintiff can proceed with this suit is the absence of probable cause for defendant's action. Until he has done this, he cannot call the defendant's motives in question. This is conceded by his counsel. What constitutes probable cause? The answer is given by *Daniel, J.,* in *Cabiness v. Martin,* 14 N. C., 454, quoting *Judge Washington:* "I understand it to be the existence of circumstances and facts, sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty was

guilty; it is a case of apparent guilt, as contradistinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced; but the guilt should be so apparent at that time as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others as well as his own, to institute a prosecution." *Smith v. Deaver,* 49 N. C., 513; Jaggard on Torts, 616. "A reasonable or well grounded suspicion of the guilt of the accused, based on circumstances sufficient to justify a reasonable belief thereof in the mind of a cautious and prudent man, is sufficient defense to the action." 19 Am. & Eng. Enc. (2 Ed.), 659. *Stacey v. Emery,* 97 U. S., 642; *Ferguson v. Arnow,* 142 N. Y., 580.

In *Spengler v. Dorry,* 56 Va., 380, the action was for malicious prosecution in suing out an attachment. *Daniel, J.,* referring to *Judge Washington's* definition in *Munns v. Dupont* (cited in *Cabiness v. Martin, supra*), says: "Modifying the definition so as to adapt to such a case as the one before us, we may, I think, properly define justifiable cause, in cases of the kind to be, a belief, by the attaching creditor, in the existence of the facts essential to the prosecution of his attachment founded upon such circumstances as, supposing him to be a man of ordinary caution, prudence and judgment, were sufficient to induce such belief."

It is conceded that when the facts are admitted it is the duty of the court to declare, as a question of law, whether there is probable cause. *Daniel, J.,* in *Swaim v. Stafford,* 25 N. C., 289, says: "What is probable cause when the facts are admitted is a pure question of law." The law has been uniformly so held in this State. In *Beale v. Roberson,* 29 N. C., 280, *Ruffin, C. J.,* after reviewing the English authorities, in connection with our own, says: "It would seem then, that making a question on this subject must be regarded as an attempt to move fixed things, and cannot be successful either in England or here." He also says that however difficult it

may be, it is a question which a judge can deal with better than a jury; as he does with reasonable time, due diligence and legal provocation and the like. *Vickers v. Logan,* 44 N. C., 394; *Jones v. Railroad,* 125 N. C., 227. In *Kirkham v. Coe,* 46 N. C., 423, the judge upon the entire evidence instructed the jury that there was not probable cause. In *Honeycut v. Freeman,* 35 N. C., 320, the court held as matter of law that there was not probable cause. In this case, His Honor in effect instructed the jury that there was probable cause. There was nothing to be submitted to the jury—the defendant admitted every portion of plaintiff's testimony, material to the inquiry, to be true. In ascertaining whether the defendant had probable cause, we are to consider only those facts which were known to him at the time he sued out the attachment. Those facts and circumstances alone which were known to defendant at the time of the affidavit upon which the warrant of attachment was based are to be considered in determining the question whether he had probable cause. *Swaim v. Stafford, supra; Beale v. Roberson, supra.*

The defendant Brown knew that plaintiff was indebted to the bank in a large amount—that the debt was unsecured and had been running a long time, interest being paid. That, although urged to do so, plaintiff had made no payment whatever on the notes; that he had withdrawn his account from the bank. In this connection the reason given for doing so is not material, the withdrawal deprived the bank of any opportunity of keeping up with his cash transactions, knowing the sources from which he was drawing cash and the disposition made of it. He had a right to withdraw his account, if he saw fit, but when he did so, he was bound to know that the bank would not longer extend him credit. The defendant knew of the litigation with his wife and its effect upon his business and property. In the light of these facts, the letter of May 21, 1903, informed the defendant of his condition and his apprehensions in regard to the future of his business. The bank

was under no obligation to accept his proposition, no matter how sincere and honest he was in making it. The defendant Brown must have known that a conveyance of the property encumbered with two mortgages of $5,000—a pending claim for alimony *pendente lite* reasonably anticipated to be not less than $4,000—secured on the property by a notice of *lis pendens*—with the right to renew the demand—the property further encumbered with an *inchoate* dower right—certainly all of these incumberances rendered the security offered for $20,000 precarious. No prudent person would have loaned so much upon the property with the chances, the almost certainty, of litigation. In this condition of affairs, the defendant Brown goes to Taylorsville, and thence to the mill; he finds that plaintiff has sold very nearly, if not quite, all of his personal property, has dismantled and shut down the mill, leased out the store for two years, left the entire property uninsured, and gone, as his son tells him, to a distant State. It is true that plaintiff's son gives defendant an account of conditions as he understands them, and we take it does so honestly. There is no suggestion of the disposition made of the money for which the property had been sold—his son says because he did not ask. The defendant was not bound to accept the son's explanations of the father's conduct, he could well have concluded that the son himself did not understand the purposes of his father. In this condition of affairs it was certainly the duty of the officers of the bank to take some action looking to the collection of the debt—to have failed in that respect would have subjected them to censure, if not personal liability. No other course than an attachment was open to them. The plaintiff was out of the State, no personal service could be made nor could any injunction have been served on him. The defendant must either have quietly awaited developments and taken the risk of further sales by plaintiff while out of the State, or of his return or of other creditors attaching.

The plaintiff's counsel strongly contend in a well considered brief that the facts which were known to defendant Brown should have assured him that the bank was in no danger of losing the debt; that plaintiff was amply able to pay his debts in full; that he knew why plaintiff had gone to Cincinnati and that he would return on Monday. That while the conditions existing at the time of suing out the warrant might have constituted probable cause for action by some other person, that the same facts did not constitute such cause to justify defendant Brown's action. This is equivalent to saying that Brown swore falsely in his affidavit, that he did not in fact believe that plaintiff was guilty of fraudulent conduct. We are of the opinion that when all of the facts and circumstances known to defendant Brown are taken into consideration, he had probable cause to sue out the warrant. Was there any evidence that in truth he did not honestly believe that to which he swore? But, says the plaintiff, did not plaintiff's son explain his father's absence and when he would return, and did not Brown say that he had the utmost confidence in Dr. Moore—had been his friend and had no ground to take any action? Brown was under no obligation to accept the son's version of his father's conduct, and his action shows that he did not do so. He may not, at the time, have determined upon the course he would pursue to secure the bank's debt. If he had done so, he would hardly have notified the son that he was going to return to Statesville and sue out an attachment. That would not have been the conduct of a prudent man trying to secure a debt of $5,000. It is asked: "Were not the circumstances now relied on as suspicious, explained to the defendants and explained to their satisfaction?" The answer is found in the defendant's action. Again it is asked: "Didn't they say, after hearing the explanations, that they had the utmost confidence in Dr. Moore?" The testimony upon this point is as follows: Mr. Moore says that he told defendant Brown that the property had been sold; that

he did not ask him where the money was; told him that the running capital had been practically run out of the business on account of the suit; that they had to increase the capital some way or the mill had to shut down. "Mr. Brown told you he had always been your father's friend in his business? Yes, sir. Let him have this money to be used in conducting his business? Yes, sir, had the utmost confidence in him. And when he told him he was his friend he was? Yes, sir. Said he had the utmost confidence in him."

We do not construe this language as plaintiff does. To our minds it is rather the language of a man more disappointed in the conduct of one to whom he had extended credit because of his confidence and friendship. This language must be interpreted in the light of time, place and circumstances. Here was the cashier of a bank, who had for two years been renewing and increasing a loan to his friend without security to enable him to carry on his business. When he goes to see him for the purpose of securing his debt, the debtor has sold off property of large value, as it afterwards turns out $8,000, shut down the mill, permitted the insurance to expire and gone to a distant State, leaving his son, a young student, just from college, in charge. Certainly his statement that he had trusted and had reposed confidence in plaintiff does not show a state of mind inconsistent with his action taken shortly thereafter. That Brown was anxious about the debt is evident from his actions, as well as his words. Plaintiff was put upon notice that the bank desired payment, and was urgently pressing for payment; that it had rejected his proposition. To take the most favorable view of his conduct, was it not folly on his part to leave the State under the circumstances known to him; was not his entire conduct well calculated to cause his creditors to reasonably apprehend that their debts were in jeopardy. The plaintiff says that the dissolution of the attachment shows an absence of probable cause. Whatever effect such order would have had if made upon the

merits, it is not necessary to discuss, because the order was made upon plaintiff's payment of the debt. No other course was open to the court or the defendant bank. The fact that plaintiff returned on Monday following the attachment and paid the debt cannot be considered on the question of probable cause, nor can the fact that plaintiff caused the proceeds of the personal property, including the manufactured goods in the mill which he had sold, amounting to $8,000 to be deposited in the bank in Cincinnati to the credit of his nephew, Dr. Payne. "If by his folly or his fraud the plaintiff exposed himself to a well grounded suspicion that he was guilty of the crime of which he was charged, he cannot claim that there was not probable cause for the prosecution." 19 Am. & Eng. Enc. (2 Ed.), 659. The examination of the cases in our own and other reports shows that the courts have, with practical uniformity, held that when the facts are admitted, as by a demurrer to the evidence, the question of probable cause has been decided as a matter of law. When the testimony is conflicting, the court instructs the jury as to the law, leaving to them to find the truth of the matter by applying the law to the facts as they find them to be. *Mr. Justice Hunt,* in *Stacey v. Emery, supra,* says: "The question of malice or good faith is not an element in the case. It is not a question of motive. If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient. Whether the officer seized the occasion to do an act which would injure another, or whether he moved reluctantly is quite immaterial."

In *Williard v. Holmes,* 142 N. Y., 492, *Gray, J.,* in discussing the law in regard to suing out an attachment, says: "It was a process which the statute authorized and which is usual in such cases, and its use subjects this defendant to no unfavorable criticism, if it accompanied the institution of an honest suit." He further says: "The circumstances to sustain

this right of action must appear to have been such that no reasonable man could have been influenced thereby to the belief that the plaintiff had unauthorizedly committed the company, whose officer he had been, to a liability which it had not incurred and which was foreign to its chartered purposes. It is our judgment that the facts did not justify the trial court in submitting the case to the jury and that, upon all the evidence, it was error to deny the defendant's motion to dismiss the complaint. The material facts were not in dispute, and whether there was probable cause for the prosecution of the former action became a question of law solely for the court." The law is discussed in the case of *Stewart v. Sonneborn,* 98 U. S., 187. The authorities are reviewed in an able opinion by *Mr. Justice Strong.*

The plaintiff strongly urges upon our attention the fact that he owned a large quantity of real estate of large value. In this action we do not perceive that this fact is material upon the question of probable cause. If the defendant had such cause to believe that plaintiff was disposing of his property to defraud his creditors, or had left the State for that purpose, the value of his property was of no moment. He could as easily dispose of a large quantity by conveyance as a small quantity. A very wealthy man, whose conduct is such as to give to his creditors probable cause to sue out an attachment, is in no better position in that respect than a man with small means. That defendant was seriously apprehensive in regard to its debt is shown by the testimony of plaintiff's son. If this were an action for abuse of process by levying the attachment upon property of value largely in excess of the debt or otherwise using the process oppressively, the testimony in respect to the value of the property would be material. *Railroad Co. v. Hardware Co.,* 138 N. C., 174.

Upon a careful examination of the entire record, we find no error in His Honor's judgment.

No Error.

MAY v. GETTY.

(Filed December 15, 1905).

Contracts— Rescission and Abandonment— Question for Court — Evidence — Specific Performance — Vendor and Vendee—Findings of Fact — Executions — Attachment— Non-residents—Judgments—Collateral Attack.

1. Parties to a written contract may by parol rescind or by matter *in pais* abandon the same.

2. What will amount to an abandonment of a contract is a question of law and the acts and conduct which are relied on to constitute the abandonment should be clearly proved, and they must be positive, unequivocal and inconsistent with the existence of a contract, but when thus established they will bar the right to specific performance.

3. Where it appears that the vendee, in a contract for the sale of property at $2,350.00 had never paid any money, other than $100, paid on the date of the contract and never demanded a deed and two years after the execution of the contract, left the State and has never since exercised any ownership or had possession of the property, and that he told the vendor twelve or thirteen years ago that he did not think he could pay for it and if he could make his money out of the property, to go ahead and do so, and that he left the property with the intention of relinquishing all rights, *held*, these facts are sufficient to show a rescission and abandonment of the contract.

4. Where there was evidence to sustain the findings of fact as to the rescission and abandonment of a contract, the findings will not be reviewed by this court.

5. Under section 370 of The Code, the sheriff, upon receiving an execution, is directed to sell the property previously attached by him and is invested with as much power and authority to act in the premises as if an execution, in the form of a *venditioni exponas*, had been issued to him, specially commanding him to sell the particular property.

6. A plaintiff cannot take a general and personal judgment against a defendant, who is a non-resident, upon a service by publication and not even when an attachment has been levied on his property, the court having jurisdiction to adjudge against him only to the extent of the property seized.

7. The interest of a vendee in a contract for the purchase of property who has paid a part of the purchase money, is not the subject of sale under execution.

8. The judgment in another suit is conclusive as to the validity of the cause of action in a collateral proceeding, except for want of jurisdiction.

9. In an action for the specific performance of a contract to convey, if the plaintiff can give a perfect title at the time of the trial, it is sufficient to induce a court of equity to compel performance of the contract.

ACTION by S. J. May and wife against R. P. Getty and others, heard by *Judge T. J. Shaw* and a jury, at the Spring Term, 1905, of the Superior Court of MACON, on exceptions to the report of a referee.

This action was brought to compel specific performance of a contract to convey land, made November 23, 1896, between the plaintiffs, S. J. May and wife, and the defendant, R. P. Getty. The defendants resist the enforcement of the plaintiffs' equity upon the ground that they are not the owners of the title they contracted to convey. It appears that on June 22, 1889, the plaintiffs, by an instrument, having in some respects the form of a deed, covenanted for the consideration of $2,350 to convey to H. V. Maxwell "all their right, title and interest in and to the mineral interests in certain land in Macon County, on Partridge Creek, known as the 'Forrester Gold Mine,' and consisting of three several tracts." This is the land in controversy. They further agree in said instrument "to make to H. V. Maxwell or his assigns, a good and sufficient deed with warranty," to all their mineral interests in the said tracts of land. On November 23, 1896, the plain-

tiffs contracted to convey with covenant of warranty to the defendant R. P. Getty, for the consideration of $6,000, the land above described. The plaintiffs allege that the purchase money so agreed to be paid has not been paid in full, and they demand judgment for the balance due, $4,400, and for a sale of the land. The defendants aver that, at the date of said contract, and at the date of the contract with Maxwell, the plaintiffs did not have a good title to the land, as H. V. Maxwell and J. M. Forrester had interests in the fifty acre tract—Maxwell an interest in the sixty-one acre tract and Forrester the entire interest in the ten and one-half acre tract, and that the title was further incumbered and complicated by the outstanding contract of the plaintiffs with Maxwell for the sale of their interest to him, which contract has already been set forth. It further appears that Forrester duly contracted to sell his interests to the plaintiff, S. J. May, for $1,070. Sundry payments were made by the defendant Getty on the purchase money due by him upon his contract with S. J. May, leaving a balance due of $4,889.76, and also by the plaintiff, S. J. May, on the purchase money due by him upon his contract with Forrester, leaving a balance due of $1,313.25. H. V. Maxwell, on March 5, 1896, for the consideration of $1 transferred all his right, title and interest in the land, to H. P. Wyman, by an instrument in the form of a deed, but not having any seal, and Wyman conveyed all the right, title and interest thus acquired, to the defendant R. D. Woodward, by deed dated January 17, 1900, for the consideration of $150.

On August 25, 1893, the plaintiff S. J. May, brought suit against Maxwell for the sum of $2,360, balance due on the contract for the sale of the mining property above mentioned, and caused an attachment to be issued and publication to be made. Maxwell being then a non-resident, the said attachment was levied on the property described in the contract between May and Maxwell, and also on the other real estate belonging to Maxwell, including all interest he had in the property in

controversy, outside of that mentioned in the said contract. The plaintiff May recovered judgment, which recites the issuing of the attachment and the levy of it on the said lands and interests by the sheriff "as appears by his return." A general execution issued upon this judgment in which there was no reference to the attachment. After referring to the judgment roll, it required the sheriff, if sufficient personal property could not be found, to satisfy the said judgment out of any real property of the defendant in his county "in whose hands soever the same may be." The description of the property, in the return of the sheriff upon the execution, corresponds with that found in his return upon the warrant of attachment. At the sheriff's sale, August 6, 1894, the property was purchased by the plaintiff, Sarah J. May, and a deed was made to her by the sheriff, August 13, 1894.

The referee found as facts that Maxwell never tendered or paid May any money, other than $100 paid on the date of the contract, and never demanded the deed for the land. Two years after the execution of the contract with May, Maxwell left this State and has never since exercised any ownership over this property or had possession of the same. Thereupon, May entered upon the said property and held possession thereof until the date of the Getty contract (either for himself or by authority of his wife). Maxwell has not since been a resident of this State; that S. J. May, acting under authority from his wife, took possession of the property shortly after the execution of the deed from the sheriff to Sarah J. May, and did certain work tending to develop the property and at intervals took ore therefrom, and did other work or repairs when necessary to keep the property in shape until the date of the contract to R. P. Getty, at which time said Getty took possession and spent about $6,000 in developing the mine, improving it, putting up buildings and taking out between 1,500 and 2,000 tons of ore.

In this connection it is well to state that the court found,

as additional facts, that twelve or thirteen years prior to the date of the judgment (Spring Term, 1905), "H. V. Maxwell told S. J. May that the parties who were to furnish him with the money to pay for the property had failed to do so, and that he did not think he could pay him, and if he could make his money out of the property, to go ahead and do so. Maxwell left the State, has never exercised possession over the property since or tendered any payment; that Maxwell left the property with the intention of relinquishing all rights and equities he had by reason of his contract with May, and May assented to it."

The court then held upon this finding that Maxwell abandoned the said contract and relinquished all his rights and equities thereunder at that time. The court also held that the sale and sheriff's deed under the attachment and judgment in the case of *May v. Maxwell* passed to the plaintiff, Sarah J. May, all of the property and interest of Maxwell, which were sold by the sheriff, except such interest or equity as he acquired by virtue of the contract between him and the plaintiff, S. J. May.

The case was referred and the referee reported the facts and his conclusions of law. From his report and the findings of the judge, we have taken the foregoing statement of facts. Numerous exceptions were filed to the report of the referee. The court passed upon the exceptions and finally adjudged that there was due by the defendant Getty upon his contract with the plaintiffs the sum of $4,889.76 and interest, and that the plaintiffs owed Forrester on his contract the sum of $1,313.25 and interest. It was thereupon adjudged that if the defendant Getty failed to pay the sum due by him within the time fixed in the judgment, the commissioners appointed for the purpose should sell the lands described in the contract between the plaintiff, S. J. May, and R. P. Getty, and report the sale to the court at its next term, and a similar direction was given as to the land described in the contract between the

plaintiff, S. J. May and J. M. Forrester, in case the said plaintiff failed to pay the amount found to be due to Forrester. It was further adjudged that, if the money due by Getty to the plaintiff, S. J. May, and the interest thereon, should be paid by Getty, a deed should be executed by the proper parties to Getty for the lands described in both contracts, and that out of the money so paid the sum of $1,313.25 and interest should be paid into the clerk's office for the use of the heirs of Forrester, he having died; this being required, as we assume, for the exoneration of the Forrester lands from the lien for the balance of the purchase money due under the contract between the plaintiff, S. J. May and Forrester, the said amount being properly chargeable against the plaintiffs in the general settlement and adjustment of the equities, as between the several parties, and this being a short way of relieving the Forrester land of its burden. At any rate, there was no exception to this provision of the judgment, nor was there any to its form in any particular—the defendants excepting to it only upon the ground that the court erred in adjudging any amount to be due by the defendant Getty, and that it should have adjudged that the plaintiffs were indebted to Getty in the sum of $9,330.14 with interest. Defendants appealed.

Horn & Mann for the plaintiffs.
E. B. Norvell and *Jones & Johnston* for the defendants.

WALKER, J., after stating the case: We agree with the learned counsel of the defendants that the vital questions in this case are those raised by their seventh and eighth exceptions to the referee's conclusions of law and the ruling of the court thereon. Indeed we think that a decision upon the matters thus presented will be sufficient to dispose of the appeal, as the other exceptions are subsidiary to those two, and, if there are any not thus strictly related to them, they are not essential elements in the case and the rulings upon them, even

if incorrect, and we do not think they were, cannot be assigned as reversible error.

There are three questions which we will consider in the following order: 1. Did Maxwell agree with May to rescind, and thereupon abandon the contract of sale? 2. Were the proceedings in the suit of *May v. Maxwell,* through which the *feme* plaintiff, Sarah J. May, claims title to the land of Maxwell, not covered by the said contract, valid and sufficient to vest the title in her? 3. Is there any defect in the title of the plaintiff to the Forrester land of which the defendants can avail themselves?

It is now well settled that parties to a written contract may, by parol, rescind or by matter *in pais* abandon the same. *Faw v. Whittington,* 72 N. C., 321; *Taylor v. Taylor,* 112 N. C., 27; *Holden v. Purefoy,* 108 N. C., 163; *Riley v. Jordan,* 75 N. C., 180; *Gorrell v. Alspaugh,* 120 N. C., 362. In the case first cited, *Bynum, J.,* for the court, says: "The contract is considered to have remained in force until it was rescinded by mutual consent, or until the plaintiffs did some acts inconsistent with the duty imposed upon them by the contract which amounted to an abandonment." *Dula v. Cowles,* 52 N. C., 290; *Francis v. Love,* 56 N. C., 321. What will amount to an abandonment of a contract is of course a question of law and the acts and conduct which are relied on to constitute the abandonment should be clearly proved, and they must be positive, unequivocal, and inconsistent with the existence of a contract, but when thus established they will bar the right to specific performance. *Miller v. Pierce,* 104 N. C., 390; *Faw v. Whittington, supra; Holden v. Purefoy, supra.* We are of the opinion that the facts found by the referee and the court are sufficient to show a rescission of the contract and an abandonment of all rights under it by Maxwell. They are quite as significant for the purpose of indicating the intent of the parties, and especially the purpose of Maxwell to relinquish all his rights, as any we find in the books which have been

held sufficient to defeat a claim for specific performance or the assertion of an equity in the property. *Francis v. Love,* 56 N. C., 321. There was evidence to sustain the findings of fact as to the rescission and abandonment, and this being so, the findings will not be reviewed by us. *Battle v. Mayo,* 102 N. C., 413.

The defendants' next contention is that, as the plaintiffs in the case of *May v. Maxwell* issued a general execution on the judgment instead of first having the land, which had been attached, condemned in the judgment to be sold by the sheriff under a special execution to be issued for that purpose, they lost the lien acquired by the levy of the attachment and all rights thereunder and, as the judgment was a personal one, nothing passed by the sale under the execution issued upon it to the purchaser, Sarah J. May. Counsel, in support of this position, cited *Amyett v. Backhouse,* 7 N. C., 63, and *Powell v. Baugham,* 31 N. C., 153. Those cases decide that the suing out of a writ of *fieri facias* instead of a writ of *venditioni exponas* on a judgment taken in a suit wherein an attachment has been levied, waives the lien of the attachment, there having been no condemnation of the land. By taking out a general execution on the judgment, containing no clause of condemnation, the land previously levied on under the writ of attachment was thrown into the general mass of landed property belonging to the defendant, just as if the plaintiff had taken out an execution against his property generally as is done in ordinary cases. The practice prevailed of issuing a *venditioni exponas* with a *fieri facias* clause, so that the property formerly levied upon under an attachment or *fieri facias* might be sold under the *venditioni exponas* and the special *fieri facias* might be used to reach any other property not subject to the lien of the levy. But the old procedure has given way to the new and now we have no such distinctions between the forms of process as then obtained. The law now looks more to the substance than to form, and ignores the ancient

technicalities which were frequently used to defeat justice. The Code explicitly provides that the sheriff, upon receiving the execution, shall satisfy the judgment out of the property attached by him, and for that purpose he shall proceed to sell so much of the attached property, real or personal, as may be necessary. Code, section 370. This is an express direction to the sheriff to sell the property previously levied on by him under the attachment, and invests him with as much power and authority to act in the premises as if an execution, in the form of a *venditioni exponas,* had been issued to him, specially commanding him to sell the particular property. This has been the uniform construction of our statute upon the subject, as will appear by reference to the adjudged cases. *Electric Co. v. Engineering Co.,* 128 N. C., 199; *Chemical Co. v. Sloan,* 136 N. C., 122. In *Gamble v. Rhyne,* 80 N. C., 183, it is said: "The property seized is a legal deposit in the hands of the sheriff to abide the event of the suit, the lien of the attaching creditor having priority over any subsequent attachment or execution which may come to his hands; and on the rendition of judgment against the defendant and when execution is issued and comes to the sheriff's hands, then his powers as sheriff, under the attachment to hold merely, are merged into the larger powers acquired by him under the execution." It is undoubtedly true that a plaintiff cannot take a general and personal judgment against a defendant, who is a non-resident, upon a service by publication and not even when an attachment has been levied on his property, the court having jurisdiction to adjudge against him only to the extent of the property seized. In the latter case it acquires jurisdiction by actual seizure of the *res,* under its process, and not otherwise. This is familiar learning, and our observations upon it need not be extended. *Cooper v. Reynolds,* 77 U. S. (10 Wall.), 308; *Pennoyer v. Neff,* 95 U. S., 714; *Winfree v. Bagley,* 102 N. C., 515; *Long v. Ins. Co.,* 114 N. C., 465; *Stone v. Myers,* 9 Minn., 303; *State v. Eddy,* 10 Mont., 311.

In the case of *Goodwin v. Claytor,* 137 N. C., 224, we had occasion to discuss both of these questions and it was there in part said: "It is contended that, if the debt was subject to garnishment at all, any lien acquired by the service of the writ of attachment was waived and the garnishee released by taking a general and personal judgment against the defendant and the garnishee, instead of taking an order condemning the debt to the payment of plaintiff's claim. We do not think that, if the plaintiff acquired any lien on the debt due the defendant by the tobacco company, he lost it by taking a judgment against the defendant and the garnishee. The judgment against the defendant is void as a personal judgment, as the court could acquire no jurisdiction to proceed against him, except in so far as it could, by its process, levy upon or seize his property; and in this respect the suit is, to all intents and purposes, in the nature of a proceeding *in rem,* and not one *in personam.* But in this case the defendants can derive no benefit from the fact that the execution issued upon a general judgment. It was necessary to take such a judgment to ascertain the debt, and the execution issued to the sheriff was, by virtue of the special provision of the statute we have mentioned, in the nature of a *venditioni exponas,* to sell the property attached, and, for the purpose of subjecting the latter to the payment of the judgment, the court had plenary jurisdiction." The plaintiff in the case of *May v. Maxwell* could not sell under execution, the property described in the contract with Maxwell, who had paid one hundred dollars on the purchase money, as his interest was not the subject of sale under such process (*Hinsdale v. Thornton,* 75 N. C., 381; *Ledbetter v. Anderson,* 62 N. C., 323; *Love v. Smathers,* 82 N. C., 369); but the sale passed title to the property belonging to Maxwell and not described in the contract, as there was no trust relation subsisting with respect to that. We cannot inquire into the validity of the cause of action in *May v. Maxwell,* the judgment being conclusive as to that in a collateral

proceeding. *Cooper v. Reynolds,* 77 U. S. (10 Wall.), 308. In the case cited, *Mr. Justice Miller* says that the court cannot disregard a judgment in another suit, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it, and then proceeds: "It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has often been held by this court, and by all courts, and it takes rank as an axiom of the law." That case is precisely in point, as the court was dealing with a question in all respects like the one we are now considering. If the cause of action in *May v. Maxwell* was defective, it could be taken advantage of only by a proper pleading in that cause and any ruling upon it could be reviewed by exception and appeal. The judgment, in any view, was merely erroneous and correctible by appeal and not in a collateral proceeding by direct attack.

Sarah J. May having already acquired title to the other property by reason of the rescission and abandonment of the contract, as we have shown, it therefore follows that as the proceedings in the attachment suit cannot be successfully assailed, the plaintiffs can give a good title to all the land embraced in their contract with the defendant Getty, unless there is some defect in the title to the Forrester land. It is not denied that Forrester had a good title to the three several tracts of land which, on the 16th day of November, 1896, he contracted to sell to S. J. May, or rather that he owned the right, title and interest therein which he claimed. This being so, we do not see why, under the judgment of the court in this action, the defendants will not be fully protected as to this part of the land. If they pay the amount found by the court to be due, as the balance of the purchase money under the contract of the plaintiffs with the defendant Getty, with interest and costs, so much of that payment will be applied to the

amount due by the plaintiff, S. J. May, on the Forrester contract as will discharge it and relieve the Forrester land of any further lien. And the same result will follow if the mineral interests and other rights and property adjudged to be sold to pay the sum of $4,889.76, due on the plaintiff's contract with the defendant Getty, bring enough to pay that amount with interest and costs. If the property so adjudged to be sold does not bring enough, the rights of the parties can be easily and equitably adjusted by a sale of the Forrester land, upon the principle which the learned judge evidently had in mind when the judgment was rendered, and which is plainly set forth therein, namely, by a sale of the Forrester interest and the application of the proceeds, first, to the payment of the Forrester debt, and then to the payment of any balance due the plaintiffs; or, if the plaintiffs redeem the Forrester interest from the lien, adjudged to rest upon it, by subrogating them to the rights of F. M. Morgan, administrator of Forrester, when they may have that interest sold to reimburse themselves, provided they have not already been paid in full the amount due by the defendant Getty. The latter under this arrangement cannot lose anything unless by his own default.

In the discussion of the case we have treated the instrument executed by S. J. May to H. V. Maxwell, as a contract to convey, as it is such in substance and effect. And of the same nature are the instruments executed by S. J. May to R. P. Getty and by J. M. Forrester to S. J. May.

We have carefully reviewed the whole case and are unable to see why the defendant Getty will not be able to secure a good and indeed a perfect title, if he complies with the terms of the decree by paying the amount adjudged to be due by him. We do not deem it necessary to refer particularly to the other exceptions, as the most of them are practically covered by the decision we have already made, and those that

are not, either refer to matters not reviewable here or are in themselves without merit.

If there ever has been any defect in the title, it does not exist now; and if the plaintiffs can give a perfect title at the time of the trial, it is sufficient to induce a court of equity to compel performance of the contract. *Hughes v. McNider*, 90 N. C., 248.

There was no error in the rulings and judgment of the court below.

No Error.

FORTUNE v. COMMISSIONERS.

(Filed December 15, 1905).

Construction of Statutes—Auditor of Buncombe County—Duties—Tax Lists—Officers—Register of Deeds—Ratification Clause.

1. A statute should be construed with reference to its general scope and the intent of the Legislature in enacting it and, in order to ascertain what was the purpose, we must give effect to all of its clauses and provisions.

2. Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its object.

3. The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the Legislature can be gathered from the context or from the general purpose and tenor of the enactment.

4. Clerical errors, misprisions, mere inadvertences or omissions which, if not corrected, would render the statute unmeaning or incapable of reasonable construction or would defeat or impair its intended operation, will not necessarily vitiate the act, for they will be corrected, if practicable.

5. A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain and convincing.

6. Chapter 703, Laws 1905, which created the office of Auditor of Buncombe County and prescribed as one of his duties that of making out the tax lists and further required him to perform "all the duties required by section 74 of the Public Laws of 1905 to be performed by the register of deeds," etc., will be construed to refer to section 74 of the Machinery Act, which prescribes the duties of the register of deeds with reference to making out tax lists, this being the only chapter of the Laws of 1905 that contains as many as 74 sections and the only one referring to such duties.

7. The fact that the Machinery Act (chap. 590) was ratified two days later than chapter 703 should not have the effect of defeating the will of the Legislature otherwise sufficiently declared, judicial notice being taken of the requirements of the Constitution, Art. II, sec. 14, that a law imposing taxes cannot pass unless the bill has been read on three several days.

8. The auditor's duty prescribed by section 12 of chapter 703, Laws 1905, of examining all books and papers of the county officials, for the purpose of keeping a record of fees and commissions received by them cannot be performed under the terms of the act until after the next election, it being manifest that the change from the fee to the salary system was not to take effect until after the present terms expire.

9. The provision of section 12 of chapter 703, Laws 1905, that the auditor shall prepare the tax lists and perform all other duties prescribed by section 74, of the Machinery Act, is effective from July 1, 1905, when the auditors' term of office commenced.

10. When an act creates an office to commence at a certain time and directs its incumbent to perform certain duties which, though formerly belonging to another office, are required by law to be performed annually at a specified time, the officer must perform them, if at all, at the time specified.

11. The office of register of deeds is constitutional, but the duties are statutory, and the Legislature may, within reasonable limits, change the duties and diminish the emoluments of the office, if the public welfare requires it to be done.

12. The expression used in the section 22, namely: "This act shall be in full force and effect" must have been intended, by implication, to give the act immediate operation as to those matters which pertained to the office of auditor, created by it, for the regulation of which there seemed to be urgent need.

ACTION for a mandamus by A. B. Fortune against Board of County Commissioners of Buncombe, pending in the Superior Court of BUNCOMBE, and heard by *Judge Fred Moore*, by consent, at Chambers in Asheville, on August 14, 1905.

The case was heard upon a case agreed which was as follows:

1. That A. B. Fortune is the register of deeds for the county of Buncombe, duly qualified and elected, and as such has been performing the duties incident to said office since the first Monday of December, 1904, and that his term of office will not expire until the first day of December, 1906.

2. That M. L. Reed, C. P. Weaver, R. B. Clayton, Frank Wells and Marion Glenn were duly elected and qualified as commissioners for the county of Buncombe on the first Monday of December, 1904, and as such have been filling the offices of county commissioners since said date and constitute the board of county commissioners of the county, and their term of office will not expire until the first Monday of December, 1906.

3. That the General Assembly of North Carolina, at its session in 1905, passed an act entitled, "An act to amend an act to provide for the assessment of property and the collection of taxes," which said act was ratified on March 6, 1905, and went into force from and after its ratification, the same being chapter 590, Laws 1905, and is made a part of this case.

4. That the said General Assembly at its session of 1905 passed an act (chapter 703, Laws 1905,) entitled, "An act to fix salaries for the officers of Buncombe county, and to

increase the road fund and to create the office of auditor of Buncombe County," which said act was ratified on March 4, 1905, and is made a part of this case.

5. That on July 10, 1905, the plaintiff requested and demanded of the board of commissioners that the tax lists of the county be delivered to him for the purpose of performing the duties required of him by chapter 590, Laws 1905.

6. That the board of commissioners declined and refused to permit the plaintiff to have the tax lists, and declined and refused to make an order for the payment of the said register of deeds for the work of computing the taxes and making out the tax lists, and declined and refused to permit the said register of deeds to perform any of the duties in relation to said tax lists required of him by said chapter 590.

7. That the State Auditor furnished the plaintiff books and blanks for the purpose of preparing the tax lists, and the same were demanded of him by the board of commissioners and R. J. Stokely, and were delivered to said Stokely under protest—the plaintiff denying the right of Stokely or the board of commissioners to deprive him of the right to perform the duties mentioned and described in said chapter 590.

8. That the plaintiff is, by virtue of section 2 of Article VII of the Constitution, *ex officio* clerk of the board of county commissioners.

9. That said Stokely, on July 1, 1905, qualified as auditor for Buncombe County, and is now performing the duties required by section 12 of said chapter 703, Laws 1905, and is now, under authority of said act and by order of said commissioners, computing the taxes and preparing the tax lists of the county for the year 1905.

It is insisted by the plaintiff that he is entitled to perform the duties required of him by said chapter 590, and he asks the court for a writ of *mandamus* to compel the commissioners of the county to comply with the conditions of the provisions of chapter 590, Laws 1905, and to turn over to him the tax

lists for the county, which said tax lists they have undertaken to place in the hands of said Stokely.

It is insisted by the defendants that said Stokely, by virtue of chapter 703, Laws 1905, from and after July 1, 1905, became the auditor for the county and entitled to perform all the duties and functions of said office as prescribed in said chapter 703, and as such auditor he was the proper person to compute and make out the tax lists for the year 1905 for the county of Buncombe—the said auditor's term beginning on the first day of July, 1905.

Upon the foregoing facts, judgment was rendered that the plaintiff is entitled to the tax lists and to perform the duties in regard thereto, which are specified in the acts of 1905, chapter 590, section 74, and to receive the compensation for his services in that behalf. It was then adjudged that a peremptory writ of *mandamus* issue, requiring the defendant to deliver the lists to the plaintiff for the purposes aforesaid, and to pay such compensation as they may deem proper for his services in computing the taxes, completing the lists and making copies as required by law. The court further adjudged that said Stokely is the duly elected auditor of Buncombe County and that his term of office, as such, began on the first day of July, 1905. The defendants were adjudged to pay the costs. From the judgment of the court they appealed.

Merrimon & Merrimon for the plaintiff.
Chas. A. Webb for the defendant.

WALKER, J., after stating the facts: The correctness of the principles by which statutes should be construed, as stated with much clearness in the brief of the plaintiff's counsel, may be readily conceded, and yet we are of opinion, if the statute in question is examined in the light of those principles, the plaintiff has not shown himself entitled to the relief which he

seeks. Some of the cardinal rules for the interpretation of a statute are that it should be construed with reference to its general scope and the intent of the Legislature in enacting it and, in order to ascertain what was the purpose, we must give effect to all of its clauses and provisions. Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its object. The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the Legislature can be gathered from the context or from the general purpose and tenor of the enactment. Clerical errors or misprisions which, if not corrected, would render the statute unmeaning or incapable of reasonable construction or would defeat or impair its intended operation, will not necessarily vitiate the act, for they will be corrected, if practicable. Nor will mere inadvertences or omissions have that effect, provided they can be supplied by reference to the context or to other statutes, and the true reading of the statute made obvious and its real meaning apparent. These principles are fully set forth and aptly illustrated, by reference to decided cases, in Black on Interpretation of Laws, sections 30 to 39. Guided by them, we should be able to ascertain and declare what was the intention of the Legislature with reference to the matter involved in this case, and whether it has been sufficiently expressed in the act under consideration. It seems that the leading purpose was to reduce expenses and to provide for the management of the affairs of the county in the future upon a more economical basis. At the same time, it was thought fair and just that a radical change from the fee system to the salary system should not take effect until the terms of those now in office should expire. In construing the act, we should give proper heed to this controlling idea and bring the different provisions of the statute into harmony with it, if this can reasonably be done. The office of auditor of the county was created, and at the same time filled

by the appointment of Stokely, and it is expressly provided that his term shall begin on the first day of July, 1905. So far, there can be no misunderstanding. Section 12 prescribed the duties of the auditor and among others therein enumerated is the duty of making out a copy of the tax list of each township for the tax collector therein. He is further required to perform "all the duties required by section 74 of the Public Laws of 1905, to be performed by the register of deeds, and to prepare for publication the annual statements required by law." One difficulty in construing the act, and an insuperable obstacle as the plaintiff's counsel contend, in the way of enforcing the provision which we have quoted, is that there is no reference therein to any particular chapter of the Acts of 1905. It is argued that this is a patent ambiguity which defeats the operation of that clause. "A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain and convincing." Black, Int. of Laws, sec. 58. Under this rule, we may call to our aid anything in the act itself or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description shall be altogether rejected in making the search for the true meaning, but it may be used in connection with anything outside of the statute to which it refers and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. Black, *supra*, sec. 38. But ours is not so much an erroneous, as an inaccurate description, and the question is whether its words are adequate to express with sufficient certainty the intention of the Legislature. It has been held that if a later act expressly refers to a designated

section of an earlier one, to which it can have no application, but there is another section of the prior act to which, and to which alone, in view of the subject matter, the later act can properly refer, it will be read according to the manifest purpose of the Legislature, and the misdescription will not prevent the reasonable construction that the Legislature intended to refer to the latter section. *School Directors v. School Directors,* 73 Ill., 249; *Plank Road Co. v. Reynolds,* 3 Wis., 258; Black, *supra,* sec. 38.

When we turn to chapter 590 of the Acts of 1905, commonly known as the "Machinery Act," we find that section 74 prescribes the duties of the register of deeds with reference to computing the taxes and preparing the tax lists of the county, and this is the only chapter of those acts that contains as many as seventy-four sections, and it is the only one referring to such duties. It is true that chapter 590 was ratified two days later than chapter 703, but this should not have the effect of defeating the will of the Legislature otherwise sufficiently declared. Taking judicial notice of the course of legislation as affected by the requirements of the Constitution, Article II, section 14, that a law imposing taxes cannot pass unless a bill for the purpose has been read on three several days, we must assume that the bill which finally became chapter 590 was pending in one of the houses of the General Assembly at the time that chapter 703 became a law, and was nearing its completion, being in the last of the formative stages of legislation. It was not possible then, to indicate by number the chapter of the laws to which reference was made, as the arrangement of the acts into chapters had not then been effected, but it was possible to indicate the section. We have no doubt as to the intention, and conclude that the mere designation of the section was sufficient, under the circumstances, for us to identify with certainty the chapter and section to which the reference was made.

This brings us to the consideration of the other question,

whether it was intended that the act should have operation from July 1, 1905, as to the duties mentioned in that section. By section 12 of chapter 703 of the Acts of 1905, the auditor is required to perform various duties, the most, if not all of which, were the duties of other officers at that time. In the view we take of the case, it is not necessary that we should stop to inquire whether all of said duties appertained to other offices then existing, or whether some of them were newly created. It is sufficient for us to say that one of the duties, namely, the examination of all books and papers of the county officers, for the purpose of keeping a record of fees and commissions received by them, cannot be performed under the terms of the act until after the next election, as the liability of the said officers to account for fees and commissions received by them, cannot arise during their present terms of office—it being manifest that the change from the fee to the salary system was not intended to take effect until after the present terms expire. But there is no reason why the act should not be allowed to have full operation as to all duties not within that category. The language is explicit, that the auditor shall prepare the tax lists and perform all other duties prescribed by section 74 of the Laws of 1905, and this provision must have effect from July 1, 1905, when the auditor's term of office commenced, unless by a subsequent section its operation is postponed. Section 22 provides as follows: "This act shall be in full force and effect from and after the expiration of the term of office of the officers elected for said county at the election in November, 1904." The use of the adjective "full" implies that the act shall have some force and effect at once and its clear meaning is that it shall have such force and effect as to all official duties, except those which cannot be performed until after the expiration of the present terms of the county officers. This must be true, if we give to the word "full" its natural and ordinary meaning and then construe the act with due regard to the manifest intention of the Legisla-

ture. When an act creates an office to commence at a certain time and direct its incumbent to perform certain duties which, though formerly belonging to another office, are required to be preformed annually at a specified time, the officer must perform them, if at all, at the time specified. There is nothing in this act to restrict the plain, direct and positive requirement of the statute that he shall prepare the tax lists, to a particular period of time, and there is no good reason why the operation of the act in this respect should be deferred. The mere fact that the duty thus required of him had theretofore been annexed to another office and that the present incumbent of that office will be deprived of the compensation allowed for the service, is not sufficient to override the plain intent of the statute. Again the act refers to the duties of the register of deeds as prescribed in section 74 of the Laws of 1905. That section requires those duties to be performed in the years 1905 and 1906, and it must be the clear intendment that those duties shall be performed by the auditor in the same years. This is in accord with the spirit and intent of chapter 703 to reduce expenses as speedily as is consistent with a just regard for existing rights. The abolition of the fee system was postponed until the expiration of the present official terms, for reasons which appeared to the Legislature to be sound and just, but they do not apply to the mere transfer of some of the duties of one officer to another then created by the statute. Nor is there any constitutional objection to such transfer. The office is a constitutional one, it is true, but the duties are statutory. The Legislature may within reasonable limits change the duties and diminish the emoluments of the office if the public welfare requires it to be done, and to this the incumbent must submit. *Bunting v. Gales,* 77 N. C., 283; *Mial v. Ellington,* 134 N. C., 131; *Hoke v. Henderson,* 15 N. C., at p. 20.

We have not adverted to the fact that the Legislature has not only created the office of auditor, but has filled it by direct

appointment, instead of waiting for its incumbent to be chosen at the next election, which shows that there was considered to be a pressing necessity for immediate change from the old system to the new, in respect to the duties assigned to the auditor by the act. His salary is fixed at $1,200, and unless our construction be the correct one, he will have very little to give, in the way of public service, in return for what he will receive. His salary would seem to be out of all proportion to the work which would be left for him to do. This result is not consistent with the main purpose and the evident policy of the enactment.

The expression used in section 22, namely, "this act shall be in full force and effect," cannot be found in any other statute and they must have been intended, by implication, to give the act immediate operation as to those matters which pertained to the office of auditor, created by it, for the regulation of which there seemed to be urgent need. If this is not the meaning, we are unable to understand what it is. The provision in regard to the duty of preparing the tax lists, if put into immediate effect, will not conflict with the other provisions concerning the substitution of salaries for fees. This is not true as to some of the other duties imposed upon the auditor, and, as to the latter, the act will take effect only after the existing terms of the officers expire.

The statute must have some effect, for it was clearly so intended, and we can give it none unless we hold that the auditor is to perform the duties of the register of deeds in respect to the tax lists, this year and the next, and, of course, thereafter unless the Legislature should otherwise provide.

There was error in the ruling of the court upon the facts agreed. The judgment will be reversed and judgment entered for the defendant.

Reversed.

BROWN v. POWER CO.

(Filed December 15, 1905).

Eminent Domain—Compensation—Market Value—Special Value to Owner— Water Power— Evidence— Impeachment of Witness—Instructions—Easement for Right of Way—Additional Burden—Verdict—Power of Court.

1. On an issue as to the market value of plaintiff's land, where a witness had testified as to the sales of upland lands in the neighborhood before the installation of the water plant, it is not competent to ask him "if the erection of the plant had not increased the value of lands 'down there,'" for the purpose of impeaching him.

2 The court is not required to give an instruction in the language of the prayer, but it is sufficient if the instruction given covers the principle involved.

3. When, for the purpose of meeting and providing for a public necessity, the citizen is compelled to sell his property or permit it to be subjected to a temporary or permanent burden, he is entitled by way of compensation, to its actual market value.

4. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted may be considered and not merely the condition it is in at the time and the use to which it is then applied by the owner.

5. If a tract of which the whole or a part is taken for a public use, possesses a special value to the owner, which can be measured by money, he is entitled to have that value considered in the estimate of compensation and damages.

6. The court properly submitted to the jury the evidence tending to show that plaintiff had water power on the river to be considered as an element of value.

7. The condemnation for the purpose of building and operating a railroad did not deprive the plaintiff of the use of her land except to the extent that it was necessary for the operation of the road. For any additional burden she was entitled to compensation to be measured with reference to the limited easement of the railroad.

8. This court has unquestioned power to set a verdict aside when there is no evidence to support it.

9. When there is any evidence proper to be submitted to the jury, this court has no power to interfere with the verdict.

10. An essential and elemementary condition precedent annexed to the exercise of the power of eminent domain is that the owner of the property, who is compelled to surrender it, shall have full compensation.

ACTION by Mary Brown against W. T. Weaver Power Co., heard by *Judge T. A. McNeill* and a jury, at the February Term, 1905, of the Superior Court of BUNCOMBE.

Plaintiff alleged that she was the owner in fee of a tract of land lying on the French Broad River in Buncombe County, a particular description of which is set forth. That she resided with her family on said land, cultivating a portion thereof. That the defendant company had erected and maintained a dam across said river in the vicinity of and below said land by which the water was thrown back and ponded said land near to her residence. That by reason of said dam her land is flooded and damaged and that, so long as the said dam is maintained, such injury and damage will continue; that by reason of said ponding, etc., the value of her land is diminished and that she will continue to suffer in comfort and convenience, and in the destruction of her water power and of a valuable spring on her premises. That by ponding the water above said dam, the defendant has taken possession of a part of said land and wrongfully withholds the same from her. She demands judgment for the possession of the portion of land so withheld. She also demands judgment for

permanent and annual damage. The defendant by way of answer admits that it has erected and maintains the dam as alleged. Denies the plaintiff's ownership of the land and the damages alleged to have been sustained, etc. For a defense it avers that it is a corporation duly chartered pursuant to the laws of the State, the charter being properly pleaded. That it has constructed and has now in operation a large and expensive dam across the French Broad River and a large plant with expensive machinery and is engaged in furnishing electric power to the public lights in Biltmore, and operating the street railway system, and lights in the city of Asheville, certain cotton mills and other manufacturing plants. That in order to carry on this business it was and is necessary to erect and maintain across the French Broad River a dam to collect water and to operate such plant and machinery; that the portion of the lands described in the complaint situated between the road bed of the Southern Railway and the western banks or margin of the said river is necessary and is required by the defendant for the purpose of constructing and operating its works; that it has made several efforts to agree with plaintiff upon a price for the said lands, etc. Defendant insists that by its charter the right to condemn said land to its use is conferred and that plaintiff's remedy is confined to the procedure provided in the charter, etc. The following issues were submitted to the jury:

"1. Is the plaintiff the owner and entitled to the possession of the lands and premises described in the complaint? Ans. Yes.

"2. Was the land of plaintiff injured by the erection of the dam, as alleged in the complaint? Ans. Yes.

"3. What permanent damage, if any, has the plaintiff sustained by reason of the erection of said dam and the ponding and backing of said river, as alleged in the complaint? Ans. $750.

"4. What annual damage, if any, has the plaintiff sus-

tained by reason of the erection of said dam and the ponding and backing of said river, as alleged in the complaint? Ans. $150."

The court reduced the amount assessed for permanent damage to $625. Defendants moved the court to set aside the verdict. Motion denied. Judgment was signed and defendant excepted and appealed.

Mark W. Brown and *Zeb V. Curtis* for the plaintiff.

Davidson, Bourne & Parker and *Tucker & Murphy* for the defendant.

CONNOR, J., after stating the facts: There was evidence tending to show the location of plaintiff's land, the location of the dam and the effect upon the land by water ponding thereon, etc, in regard to its productive capacity, the crops raised upon it before and after the erection of the dam. There was also evidence tending to show that the quantity of land upon which water was ponded was about three acres; the rental value of the land; the effect of the water ponded on the land by the dam upon the health of plaintiff's family, etc. The testimony in all of these aspects was conflicting. The estimate of the value of the land and its rental value indicated great divergence of opinion. Only such portions as relate to the exceptions need be noticed. Several of the exceptions to the rulings of His Honor upon the admission of testimony were not pressed in this court.

Mr. Ingle, a witness for the plaintiff, testified in regard to the value of real estate, etc. Upon cross-examination he stated that he had sold some worn out upland in the neighborhood of plaintiff's land for $30 and $50 an acre, giving the location of the land; that the sales were made before the installation of the water power. Defendant thereupon proposed, upon cross-examination, to ask him if the erection of defendant's plant had not increased the value of the land

"down there." The question was, upon objection, excluded and defendant excepted. Defendant's counsel concedes that this testimony was not competent for the purpose of offsetting against plaintiff's damage any benefit that may have accrued to her land by the erection of the plant, but states that his purpose was to impeach the witness and lessen the weight of his testimony in regard to value of lands. We are not quite sure how the testimony in regard to the sale of other lands in the vicinity of the plaintiff's, unless it was shown that in respect to the conditions, etc., they are similar, was relevant. The question in issue was the market value of the plaintiff's land. It seems that witness had given his opinion that it was worth $100 per acre. The defendant was permitted, without objection, to show that he had sold lands in that vicinity—worn out, and upland—at a smaller price; that such sales were made since the installation of the plant. We do not perceive how it would tend to impeach him to show that the erection of the plant had increased the value of lands "down there." The time of the sale, in respect to the erection of the plant, was shown; this enabled the jury to draw such reasonable inferences from the facts as were proper in estimating the weight to be given to his evidence in regard to the value of plaintiff's land. The exception cannot be sustained.

Plaintiff testified that her land between the river and the railroad is submerged all the year, that there is but a small portion over which a person can walk—that this was caused by the dam. That no part of the three acres was fit for agricultural purposes or pasturage now; that the erection of the dam had ruined her spring, which formerly afforded good water; that she has no other water. She testified that noxious odors came from the river, caused by ponding the water; that sickness, fevers, etc., had prevailed. She said that "before the dam was made this place was her home, and she was happy at it and could have made her support out of the bottom, and now she has no good water and no support,

and it rendered her unhappy and she did not have her health this summer, and before she had always had her health; that through the wet weather one of the houses on the place had its walls moulded, and that her things got so damp and bad that they moulded in her trunk; that they had filled the yard up trying to prevent it; that it was not that way before the dam was built, and that there was no unpleasant odor before the dam was built." There was evidence tending to show that plaintiff had an orchard on the land from which she gathered and sold fruit and that since the erection of the dam the trees had died; that she raised vegetables for market on the three acres, etc. The testimony in regard to the value of the orchard, fruit, etc., was conflicting. Mr. Hawkins testified that the three acres between the railroad and the river, if used for gardening purposes, would be worth about $100 per acre and that included the orchard; that he had run a mill all of his life and if plaintiff had a water power in front of her place before the erection of the dam, it would be worth about $500 an acre at least, and it would be worth that much on the French Broad anywhere that you could put up water power nearly. He also testified in regard to the effect of the water ponded upon the land on the orchard—that the trees were dead and that it was not worth anything for gardening, or agricultural purposes. That he never measured the fall of the river from plaintiff's south line to her north line before the erection of the dam, but he guessed it was about 3½ feet; that he looked over it, but never measured it. He was examined at much length in respect to the flow of the water, etc. He testified that in forming his estimate of the value of the land he did not know that it was all subject to the right of way of the Southern Railway; that the fact that this land was subject to an easement of the railway company would affect its value after they took possession of it because you could not farm there, but it would not affect its present damage; that it would not affect

it unless the company built a house there, or took permanent possession of it. Defendant introduced Mr. Stepp, who said that he was familiar with the land—passed it frequently, thought it worth for agricultural purposes $50 per acre; that the people asked a good deal more than that for it, but that was as much as it was worth for purpose of general farming.

Mr. Weaver, president of the defendant company, testified in regard to water power on the French Broad. That the fall from plaintiff's southern to her northern line was exactly 8¾ inches; that above this property for 1900 feet there is an eddy or pool in the river; that is, there is a swag there, etc.; that from his knowledge of water powers and what it takes to make them commercially valuable, if the defendant's dam had not been built, the whole fall on plaintiff's property would have been of no value and could not have been utilized; that 8¾ inches from a slight rise in the river would be wiped out and a wheel to give speed under such a fall would have to be an enormous affair. He testified at much length in regard to the power, concluding with the statement that it would be commercially impossible to develop 8¾ inches fall on the French Broad River, giving his reasons for the opinion, etc. He also testified in regard to the damage sustained by plaintiff in other respects. Defendant introduced several other witnesses, whose testimony in regard to the river, the fall, etc., tended to sustain its view and contention. Plaintiff introduced witnesses in reply.

At the close of the evidence defendant submitted certain prayers asking special instructions. Those which were pressed in this court are: "The court charges the jury that they cannot be influenced in this action by any sentimental considerations which might arise from the fact that this was plaintiff's home, that she was satisfied with it and did not care to sell the three acres of her land lying between the railroad and the river, nor will the jury be influenced by what plaintiff would charge for her land or was willing to take for

her land, except in so far as this consideration throws some light on the true value of the said land and the extent of the injury thereto resulting from the erection of defendant's dam."

His Honor declined to give this instruction. Defendant excepted. He instructed the jury upon the issue in regard to permanent damage, that the burden was on the plaintiff to show what permanent damage she had sustained, and that in passing upon the evidence they would take into consideration all the evidence tending to show the ponding or obstruction of the water of the stream; the extent to which the plaintiff's land was overflowed and damaged by the water ponded by the erection of the dam, if caused by its erection. "You will take into consideration the testimony tending to show that the land was rendered unfit for agricultural or gardening purposes; the quantity of it so injured, the injury or destruction of the apple orchard, injury to the spring, if any; you will take also into consideration the evidence tending to show that plaintiff had water power on the river, and that of the defendant tending to show that her water power, if there, was of no commercial value, and if there, upon the whole circumstances and all the testimony, you will determine its value, if you are of the opinion that it has value; taking into your estimate also in fixing the damages on this issue the evidence tending to show that the land of the plaintiff was subject to the right of way or easement for railroad purposes, or that a portion of it was; and you will also take into consideration, if you find from the testimony and by the greater weight of the evidence, that the plaintiff's land was injured and that the injury and damage was caused by the erection of the dam, and you further find that this injury and damage continues, then you will ascertain what the injury and damage from the erection and maintenance was, and the amount you reach will be your answer to the issue."

In conclusion His Honor said to the jury: "You are not to

be influenced by sympathy on the one side or by prejudice or bias on the other side, if any such exist. The true measure of damages in this case is the difference in the value of the land of the plaintiff that is effected by the flowage or ponding back of the water, arising from the erection of defendant's dam in its condition just prior to the erection of said dam and its value in its condition just after the erection of said dam. That the burden of proof is on the plaintiff in this case and she must establish by a preponderance of the evidence not only the fact that her lands have been damaged, but also that such injury was due to the erection of defendant's dam, and she must also establish by like preponderance of the evidence in what amount said lands have been damaged before she can recover in this action."

While we find no proposition of law in the instruction asked which is not correct, we think that His Honor's instruction in respect to the manner in which the jury should consider the evidence pertaining to the permanent damage and the measure of such damage covers the principle involved in the instruction. It is too well settled to require or justify the citation of authority that the court is not required to give the instruction in the language of the prayer. It is well settled that when, for the purpose of meeting and providing for a public necessity, the citizen is compelled to sell his property or permit it to be subjected to a temporary or permanent burden, he is entitled by way of compensation, to its actual market value. Lewis on Em. Domain, sec. 478. The difficulty arises not so much in fixing the standard of the right, as in ascertaining what elements or factors may be shown in applying the standard. Certainly where by compulsory process and for the public good the State invades and takes the property of its citizens, in the exercise of its highest prerogative in respect to property, it should pay to him *full compensation.* The highest authorities are to that effect. "The market value of property is the price which it will bring

when it is offered for sale by one who desires but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted may be considered and not merely the condition it is in at the time and the use to which it is then applied by the owner." Lewis Em. Dom., *supra*. *Mr. Justice Field* in *Boom Co. v. Patterson*, 98 U. S., 403, says: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or be regarded as valueless because he is unable to put it to any use. Others may be able to use it. Its capability of being made thus available gives it a market value which can be readily estimated." In *L. R. Junction Ry. v. Woodruff*, 49 Ark., 381 (4 Am. St. Rep., 51), it is said: "Since then, the market value is the true criterion of damages, we are led to inquire—what is the market value? The word market conveys the idea of selling and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay." Referring to the range which the testimony may take in ascertaining the market value, the court says: "As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the land owner should be allowed to state, and have his witnesses state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in

an advantageous light if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury and the opposing counsel, for the information of the jury, should be allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make."

"If a tract of which the whole or a part is taken for a public use, possesses a special value to the owner, which can be measured by money, he is entitled to have that value considered in the estimate of compensation and damages." 15 Cyc., 724; Cooley Const. Lim., secs. 567-8. Plaintiff testified without objection that she could have rented the bottom land for $100 and had been offered that sum; that she depended upon it for her sole support and would not have taken less than $100 a year for it. This last testimony, considered with what preceded it, was certainly competent to be considered by the jury in ascertaining its value. She also said that it was her home and she was happy then with her spring of good water—and that she could make her support out of the bottom. That she did not have her health and was unhappy by reason of it. We do not understand that, under the instruction of His Honor, the jury gave her compensation for the disturbance of her happy condition before the march of progress and the demands of a large city for water and lights deprived her of her bottom land and her spring. As said in *Boom Co. v. Patterson, supra:* "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern it in all cases." The instruction given the jury for their guidance conforms to the rule approved by the authorities. The defendant requested His Honor to charge the jury: "If the jury should find as a fact that the plaintiff had not used or developed and had not intended to use or to develop any water power which she might have had on

her river front, then they cannot consider the alleged destruction of such power as an element of damages in this case. That the jury cannot consider the value of plaintiff's property as a part of the water power system of the W. T. Weaver Power Company in estimating the damages occasioned by erection of defendant's dam, but only in its former condition and the difference in value between the land in its former condition and its value in its condition immediately after the erection of the dam." To the refusal to give this instruction defendant excepted. In this connection it appears in the case on appeal that at the conclusion of the charge: "Counsel for defendant requested the court to caution the jury that they should not consider the 8¾ inches of water power of plaintiff as a part of a great system, as argued to them by plaintiff's counsel. His Honor, in response, said to the jury that they would take into consideration the water power on the one side and the easement on the other, and say upon the whole evidence what it is worth." To this defendant excepted. It is said in defendant's brief that testimony in regard to the value of the water power as a part of the Weaver power, as a system or whole, was excluded. The testimony sent up does not disclose the ruling upon this point and we are not quite sure that we comprehend the extent of it. It is further stated in the brief that plaintiff's counsel in the course of his argument, read to the jury a case bearing upon the question and attempted to apply the law as therein decided to this case—that the attention of the court was called to the argument and he said that he could not prevent counsel from arguing the law to the jury. The judge was requested to caution the jury when he came to charge them. The action of His Honor in that respect was as set out in the record. The question raised by the request for special instruction, although not very clearly presented by the testimony, is whether the jury should, in arriving at the plaintiff's compensation, consider the manner in which the

water flowed through and over her land as it related to and connected with the flow over the defendant's lands, as constituting water power capable of use and development. The defendant's contention stated in the brief is: "If plaintiff did not have a water power along her river front which could be independently developed, and had not set about acquiring rights which would enable her to combine her water power with that of other riparian proprietors along the river, at the time of the erection of the dam, she was not entitled to damages for any alleged destruction of her water power." This contention presents an interesting and, as applied to the condemnation of property, an important question. The rule is thus stated by Mr. Lewis: "The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown and the fact of such adaption may be taken into consideration in estimating the compensation. Some of the authorities hold that its value for a particular use may be proved, but the proper inquiry is, what is its market value in view of any use to which it may be applied and of all the uses to which it is adapted."

The question was presented in *San Diego Co. v. Neale,* 78 Col., 63; 3 L. R. A., 83, in which it was sought to condemn land for the purpose of a reservoir. It was insisted that the value of the land as a reservoir site should not be considered because there was no practicable site for a dam on the land, the only way in which it could be so used being in connection with plaintiff's land. The court disposed of the objection by saying: "While it is true that defendant's land had no value for reservoir purposes except in connection with the land of the plaintiff, it is equally true that the plaintiff's land had comparatively little value for such purposes except

in connection with the land of the defendant. * * * Suppose, for illustration, that the two sides of a canon suitable for reservoir purposes were owned respectively by two persons who are joined as defendants in a proceeding to condemn the land by a water company which did not own any of the property. It would not be pretended that such company could take the property at its value for grazing or agricultural purposes merely because it was owned by different persons. * * * Now, there is no difference in principle between such a case and the one where the company itself owns half the canon and is seeking to acquire the other half. Nor is there any difference in principle where the company owns somewhat more than half, or the more valuable portion. The logical result of the argument for the appellant is that if the company owned but a small portion of the canon, it could acquire all the rest, without regard to the value for the only purpose for which it might have much value, merely because the other party did not own the whole and had not been able or did not choose to go into the business themselves." This case was followed in *Alloway v. Nashville,* 88 Tenn., 510; 8 L. R. A., 123. In *Boom Co. v. Patterson, supra,* the question was whether the adaptability of certain islands in the Misissippi river for boom purposes should be considered in estimating their value. The court held that it was a "circumstance which the owner had a right to insist upon as an element in estimating the value of his lands." The same contention was made, as in this case, that the charter conferred upon the company the privilege of erecting its boom at the place of its location and this prevented the defendant from utilizing his lands for that purpose. In reply to the argument, the court said: "The contention on the part of the plaintiff in error is that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons by reasons of its supposed exclusive privileges; in other words, that

by the grant of exclusive privileges to the company, the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the company, lost this element of value in his property." *Goodwin v. C. & W. Canal Co.,* 18 Ohio St., 169; *Young v. Harrison,* 17 Ga., 30. The president of the defendant company testified that the plaintiff's land between the railroad and the western bank of the river was necessary to the operations of the company. While there is no direct evidence of its value as a part of the water power, the defendant had the benefit of the testimony of experts that in no point of view was it of any commercial value. His Honor simply submitted the question to the jury to be considered as an element of value. We find no error in his ruling in this respect. In regard to the effect of the easement owned by the Southern Railway over the land, the court expressly told the jury to consider it in estimating the damages. This was proper. *Forbes v. Commissioners,* 172 Mass., 289. The condemnation for the purpose of building and operating a railroad did not deprive the plaintiff of the use of her land except to the extent that it was necessary for the operation of the road. For any additional burden she was entitled to compensation to be measured with reference to the limited easement of the railroad. *Blue v. Railroad,* 117 N. C., 644; *Phillips v. Telegraph Co.,* 130 N. C., 513; *Hodges v. Tel. Co.,* 133 N. C., 225.

The defendant strongly urges upon us the exception to His Honor's refusal to set the verdict aside. There can be no controversy in respect to the power and duty of this court to set a verdict aside when there is no evidence to support it. *Whitted v. Fuquay,* 127 N. C., 68. It is equally well settled that when there is any evidence proper to be submitted

to the jury, this court has no power to interfere. Whether there is such evidence is a question "of law or legal inference." This question, we must, in the discharge of our constitutional duty, pass upon and decide. Const., Art. IV, sec. 8. The defendant's exception assumes that the jury, in estimating the value of the land and the damages, were confined to the rental value for agricultural purposes. As we have seen, other elements of value enter into the estimate and were submitted to the jury. There was competent and legal evidence fit for their consideration in regard to these matters. If the defendant desired more specific instructions in respect to the evidence, it should have asked for them. We are impressed with the language of the court in *Railroad v. Woodruff, supra*, in disposing of a similar motion. "This is a delicate duty in any case, and especially so in a case when the sole issue is one as to value. This is so peculiarly within the province of the jury; it is a matter in which we can act with so little intelligence or satisfaction, and there is so little finality about any judgment we could render on this point, that nothing but an extreme case would justify our interference. If there was no evidence to support the verdict, we would not hesitate to exert our authority to set it aside. It must be very seldom, however, that the verdict is entirely unsupported by evidence in a case where there is but a single and simple issue submitted to the jury, as in this class of cases. * * * As long as witnesses differ so widely in their opinion as to values, and as long as litigants measure values so entirely by the standard of self-interest, we cannot hope for verdicts that shall be satisfactory to both parties. The utmost to which we can hope to attain is to sometimes reach a verdict that is unsatisfactory to both parties." In that case the estimates vibrated between $1,500 and $50,000; the jury fixed the value at $20,000. The attention of the writer was called some years ago to a case in which the commissioners appointed to assess the value of

land condemned for a street in a progressive town, fixed the amount at $1,250. The town authorities not being content with the assessment sent another jury to assess the value. They fixed it at $250. They were all intelligent, honest men and, with no change in conditions, reached conclusions so divergent. It sometimes occurs that appeals disclose, upon the record, verdicts which seem to be excessive, but this court has not, so far as we are informed, assumed the power to set them aside. When an erroneous rule for assessing damages is given the jury, it is our duty to direct a new trial, as in *Carter v. Railroad*, at this term. We do not find any error in this respect. The plaintiff must part with her land submerged by water thrown over it by the dam, and whatever value resided in the flow of the water, affected by the conformation of the bottom and banks of the river must be destroyed to meet a public necessity. Counsel informed us upon the argument that a very large, valuable, and to the public use, important motive power has been developed by defendant company, generating electricity which is utilized for lighting the streets and operating the street railways of populous towns and cities and the machinery of several cotton and other manufacturing plants. The State has conferred upon the company, to enable it to accomplish these beneficent results, one of the highest and most dangerous of its sovereign powers—that of eminent domain. An essential and elementary condition precedent annexed to the exercise of this power is that the owner of property, who is compelled to surrender it, shall have full compensation. His Honor in the exercise of his discretion reduced the amount assessed for permanent damages to $625. We can see no ground, as matter of law, authorizing us to disturb the verdict.

We have disposed of the case upon the theory that by suing for permanent damages the plaintiff concedes the right of defendant to acquire a permanent easement in her land. The judgment confers such easement upon defendant. She

recovers, by way of permanent damages, compensation in full therefor. It was agreed by counsel that the annual damage accruing prior to the beginning of the action, should be assessed for two years, and the judgment is drawn accordingly. When the judgment is discharged the defendant acquires an easement to overflow plaintiff's land to the extent set out in the judgment. *Ridley v. Railroad,* 118 N. C., 996; *Candler v. Electric Co.,* 135 N. C., 12.

Affirmed.

MAY v. LOOMIS.

(Filed December 15, 1905).

Contracts—Fraud and Deceit—Caveat Emptor—Artifice of Seller—Statements of Fact—Opinion—Fraudulent Sales—Election of Remedies—Rescission—Damages—Counterclaim.

1. In an action by plaintiff to recover on notes given in part payment of the purchase of a saw mill plant and certain standing timber, where the evidence on the part of the defendants tended to show that at the time of the trade, and as an inducement thereto, the plaintiff stated that there were three million feet of merchantable timber ascertained by two careful estimates; that the machinery was practically new, having been in use only six months and was in good condition; that as a matter of fact there was only about one million feet of timber, and this was well known to the plaintiff at the time, having been ascertained by him by estimates previously made and was unknown to the defendants, who relied upon the positive assurance and statements of the plaintiff as to the quantity of timber; that the machinery was old, and that the boilers were worn out when brought there the year before, *held,* that the court below erred in dismissing the defendants' counterclaim for damages for fraud.

2. The principle, that false representations as to material facts knowingly and wilfully made as an inducement to the contract and by which the same was effected, reasonably relied upon by the other party and causing pecuniary damage and constituting an actionable wrong, applies to contracts and sales of both real and personal property.

3. Where the parties were not at arm's length with reference to false representations and did not have equal opportunity of informing themselves, the buyers' claim for relief for fraud is not barred on the ground that they were negligent.

4. In no case can a person escape responsibility for representations on the ground that the other party was negligent in relying on them, if, in addition to making the representations, he resorted to artifice which was reasonably calculated to induce the other party to forego making inquiry.

5. Where the plaintiff, knowing that the only one of the defendants whose experience qualified him to make an examination of the property with any intelligence, was physically unable to do so, assured the defendants that he had caused the timber to be carefully estimated and that such estimates showed there were three million feet of hard wood timber, whereas, in fact the knowledge furnished to the plaintiff by these estimates showed only one milliion feet on the same, *held*, that these representations were not mere matters of opinion, but purported to be statements of fact and were so intended and accepted by the parties.

6. Where a sale has been effected by an actionable fraud, the purchaser has an election of remedies. He may ordinarily, at least at the outset, rescind the trade, in which case he can recover the purchase price or any portion of it that he may have paid, or avail himself of the facts as a defense in bar of recovery of the purchase price or any part of it which remains unpaid, or he may hold the other party to the contract and sue him to recover the damages he has sustained in consequence of the fraud.

7. In order to rescind, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm in part; he must do one or the other.

8. As a general rule, a party is not allowed to rescind where he is not in a position to put the other *in statu quo* by restoring the consideration passed; or, if after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end.

9. Where the defendants have made payments in recognition of the contract and have continued to manufacture and sell the lumber after knowledge of the fraud and are not in a position to restore the consideration, they cannot rescind the trade and plead fraud in bar of recovery on the notes, but they can set up the fraud by way of counterclaim and recover for the damages suffered.

10. The sale having been ratified, the plaintiff can maintain an action on the notes, subject to any counterclaim the defendants may have.

ACTION by Frank May against G. C. Loomis and C. N. Dotson, heard by *Judge G. S. Ferguson* and a jury, at the July Term, 1905, of the Superior Court of HAYWOOD.

The plaintiff declared on two notes, each for $750, bearing date December 13, 1902, due respectively nine and twelve months after date. The notes were drawn by defendant Loomis to defendant Dotson and endorsed to plaintiff before maturity.

The defendants answered, admitting the execution and endorsement of the notes, and alleging that the same were executed in part payment of the purchase of a saw mill plant and the standing timber on two tracts of land situated in Haywood County, one of 250 and the other of 750 acres; that said sale was effected and the notes were procured by false and fraudulent representations on the part of the plaintiff and his partner, one W. H. Cole, who were vendors in the sale, and setting up such fraud in bar of any liability on the notes. There was further answer setting up the alleged fraud and deceit by way of counterclaim, which is in part as follows: 1. That on December 13, 1902, the defendant bought three million feet of merchantable hardwood timber from the plaintiff and W. H. Cole, trading under the firm name of May & Cole, at the rate of $1 per 1,000 feet, on a tract of land on Pigeon River, in Haywood County, and also at said date, in connection with the purchase of said timber, bought of the plaintiff and his said co-partner the steam saw mill, boilers and engine located on said premises, valued at $2,500, and likewise horses, mules and wagons, valued at $500. 2. That at the time of making said sale and pending negotiations for the same, the said May & Cole represented that this was a picked tract of timber land which the said W. H. Cole had specially selected out of a large tract of land

belonging to Crary, Young & Co., and that they had made two careful estimates of the merchantable hardwood timber thereon—one by W. H. Cole individually, and the other by May & Cole—resulting in 3,000,000 feet, and that they guaranteed that there was 3,000,000 feet of merchantable timber thereon—1,000,000 feet of poplar, 1,000,000 feet of chestnut and 1,000,000 feet of oak, lynn and other merchantable hardwood outside of spruce and hemlock, which were not considered in the contract; and the defendants, relying on the representations and guarantee of May & Cole as to the quantity and kind of timber, which were knowingly false and fraudulent, and a material inducement to the contract, purchased the said 3,000,000 feet of timber at the rate of $1 per 1,000 feet, for the sum of $3,000, and at said time, relying upon the said false and fraudulent representations, intending to deceive, and which did deceive the defendants, were induced to execute the notes set out in the complaint together with other notes, and have paid off all of the said notes, except the aforesaid, when in truth and in fact there was only 464,728 feet of poplar on said boundary of land, 208,377 feet of chestnut and 240,121 feet of oak, lynn and all other timber, considered in said contract and guarantee; and the plaintiff, both as an individual and member of the firm of May & Cole, is due the defendants the sum of $2,036.77 as shortage on the 3,000,000 feet of timber purchased as aforesaid, as damages. There was further allegation of similar import as to false and fraudulent representations in regard to the other property, machinery, etc., conveyed. The plaintiff replied, denying all charges of fraud and deceit.

The defendants in apt time tendered issues addressed to each phase of their defense, and on refusal to submit them excepted and requested His Honor to settle the issues deemed by him pertinent and raised by the pleadings.

There was evidence on the part of the defendants tending

to show that at the time of the trade and as an inducement thereto, both the plaintiff and his partner stated that there were 3,000,000 feet of merchantable hardwood timber on the two tracts of land, ascertained by two careful estimates made at different times, and that the same had been picked out of 20,000 acres as 1,000 acres of choice timber land; that the machinery and other property used in connection with the same were practically new, having been in use only six months and were in good condition; that as a matter of fact there was only about 1,000,000 feet of hardwood timber on the land, and this was well known to the plaintiff at the time, having been ascertained by them by the estimates previously made, and to which the plaintiff referred, and was unknown to the defendants, who relied on the positive assurance and statements of the plaintiff as to the quantity of timber; that the machinery was old and worn and the boilers had many patches on the inside and were old worn-out boilers when brought there the year before, and so defective that they had to be immediately removed as being dangerous, and replaced at an additional cost to the defendants of something like $600.

A witness by the name of William Quiett testified, among other things, "that about a week before the trade, Cole came to the witness and asked him how much timber was on the boundary; that the witness told him there was 1,000,000 or 1,100,000 feet, and Cole replied that he thought there were 2,000,000 or 3,000,000 feet. Cole then said not to say anything about the estimate which had been made of the timber; that he had a chance of a sale and it might interfere with his deal."

There was also testimony to the effect that the defendant Loomis was without any experience in milling or stumpage, and Dotson alone, of defendant firm, had any knowledge or experience in estimating timber or manufacturing it; and that just prior to the trade and when negotiating thereon the parties went out to the land to take a look over it, when

Dotson, who had consumption and was very weak, gave out and was unable to proceed, and that Loomis was taken by one of the plaintiffs through a small portion of the smaller tract (was gone about 15 or 20 minutes) and when they returned to Dotson, who had built a fire and was resting by the roadside, Cole said: "I will guarantee 1,000,000 feet of poplar, 1,000,000 feet of chestnut and 1,000,000 feet of oak and other kinds of hardwood, sufficient to make up another million feet; that he and May had the timber estimated when they made the deal together, and also had it carefully estimated afterwards;" and during the negotiation Dotson said: "I have been physically unable to look over this property at all, and we have not seen the horses and mules and do not know the value of the machinery you are offering us, and so far as the timber on the land is concerned, we have simply to take your representations and guarantees about that; we believe you gentlemen are honest business men and if you will guarantee it to be as you have represented it, we will close the deal." This was given—Cole saying it was even better than represented.

When asked if the defendants relied on these statements as an inducement to the trade, they answered "yes," and Dotson testified further: "We had nothing else to rely on. I was unable to go over the land and they both knew it. I stated to them that Loomis was not competent or capable of estimating timber. May and Cole both guaranteed it to be as represented by them."

The defendants also offered to prove that during the bargaining, Cole advised Dotson to say nothing to people up there about the property, as they were quite peculiar and did not like for strangers to come in their country. On objection this evidence was held incompetent and the defendants excepted.

There was also evidence tending to show damage to the defendants by reason of the fraud and deceit to the amount

of several thousand dollars. At the close of the testimony His Honor declined to submit the issues of the defendant's counterclaim, dismissed the same as on judgment of nonsuit and gave judgment against the defendants on the notes. The defendants excepted and appealed.

Norwood & Norwood for the plaintiff.
S. C. Welsh and *R. D. Gilmer* for the defendants.

HOKE, J., after stating the facts: Accepting the testimony favoring defendants' claim as true, and we are required so to accept it where a nonsuit is directed against the party who offers it, the facts disclose a clear case of deliberate fraud in which there appears every element of an actionable wrong—false representations as to material facts knowingly and wilfully made as an inducement to the contract, and by which the same was effected, reasonably relied upon by the other party and causing pecuniary damage.

It is well established that the principle applies to contracts and sales of both real and personal property. The authorities are decisive and are against the ruling of the judge below as to the defendant's counterclaim. *Walsh v. Hall*, 66 N. C., 233; *Houghtalling v. Knight*, 85 N. C., 17. *Lunn v. Shermer*, 93 N. C., 165; *Ramsey v. Wallace*, 100 N. C., 75; *Brotherton v. Reynolds*, 164 Pa. St., 134.

It is urged that the buyers in this case were negligent and on that account their claim for relief is barred; but not so. The parties were not at arm's length in reference to these representations and did not have equal opportunities of informing themselves. The only one of the defendants who had any experience in such matters essayed to make an examination of the property, but broke down from weakness incident to his disease, and told the plaintiffs he would have to rely on their statements. Further, there was evidence tending to show artifice used to induce the buyers to forbear making

inquiry about the matter. In 14 Am. & Eng. Enc. (2 Ed.), 123, we find it stated: "In no case can a person escape responsibility for representations on the ground that the other party was negligent in relying on them, if, in addition to making the representations, he resorted to artifice which was reasonably calculated to induce the other party to forego making inquiry." Our decisions are to like effect. *Walsh v. Hall, supra; Hill v. Brower,* 76 N. C., 124; *Blacknall v. Rowland,* 108 N. C., 554; s. c., 116 N. C., 389.

Again, it is contended that these representations were not as to facts, but were mere matters of opinion, and we are cited to a number of authorities as supporting the plaintiff's position—*Fagan v. Newson,* 12 N. C., 20; *Saunders v. Hatterman,* 24 N. C., 32; *Lytle v. Bird,* 48 N. C., 222; *Credle v. Swindell,* 63 N. C., 305; *Etheridge v. Vernoy,* 70 N. C., 724, and some others.

As stated in *Cash Register Co. v. Townsend,* 137 N. C., 652: "Expressions of commendation or opinion or extravagant statements as to value or prospects, or the like, are not regarded as fraudulent in law;" but these representations in the case before us were not of that character; they were not mere matters of opinion, but purported to be statements of fact and were so intended and accepted by the parties.

Knowing that the only one of the defendants whose experience qualified him to make an examination of the property with any intelligence, was physically unable to do so, the plaintiffs assured the defendants that they had caused the timber on the land to be carefully estimated, and such estimate showed that there were 3,000,000 feet of hardwood timber on the tract; whereas, in fact and truth, the knowledge furnished to the plaintiffs by those estimates showed only 1,000,000 feet on the same. Even where there is doubt on the question, the matter must be referred to the jury to determine whether representations, though expressed in the form of opinion, were given and reasonably relied on

as material facts inducing the trade. And the authorities cited do not support the plaintiffs on the facts of the case before us.

In *Fagan's case, supra,* the complaining party had refused his deed because the boundaries did not include two acres of meadow land which had been pointed out to him as being part of the land bargained for. Recovery was denied, the principal opinion being based on the fact that these two acres were at the time in adverse possession of third persons, and this was sufficient to put the purchaser on inquiry; and one judge concurring, rested his opinion on the ground that the complaining party having refused the deed, no title passed, and an action for deceit would not lie simply for the loss of a good bargain.

In *Saunders' case, supra,* the court denied relief because the representations were simply matters of opinion as to value, both parties having equal opportunities to ascertain the truth by the exercise of reasonable care.

In *Vernoy's case, supra,* there was no claim or evidence tending to show actual fraud, and this opinion intimates that, in case of actual fraud, the doctrine of *caveat emptor* does not apply as was said by the same judge writing the opinion in *Hill v. Brower, supra.*

The only cases which give support to the plaintiffs' position are those of *Lytle v. Bird* and *Credle v. Swindell, supra,* in both of which it was expressly held that an action for deceit would lie in no case, on the sale of land for fraudulent representation as to the quantity sold or what particular land was included in the deed; and this on the ground that the parties should inform themselves by a survey. These two cases are contrary to the trend of modern decisions; were expressly disapproved as to the point for which they are now cited, in the case of *Walsh v. Hall, supra,* and have since been ignored as authority.

Where a sale has been effected by an actionable fraud, the

purchaser has an election of remedies. He may ordinarily, at least at the outset, rescind the trade, in which case he can recover the purchase price or any portion of it he may have paid, or avail himself of the facts as a defense in bar of recovery of the purchase price or any part of it which remains unpaid, or he may hold the other party to the contract and sue him to recover the damages he has sustained in consequence of the fraud.

In order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm in part; he must do one or the other. And, as a general rule, a party is not allowed to rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed. Furthermore, if, after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end. These principles will be found in accord with the authorities. Bishop on Contracts, secs. 679, 688; Beach on Contracts, sec. 812; Page on Contracts, secs. 137, 139; Clark on Contracts, pp. 236, 237; *Trust Co. v. Auten*, 68 Ark., 299; *Parker v. Marquis*, 64 Mo., 38.

Applying these principles to the facts before us, the defendants could not now rescind the trade and plead the fraud in bar of recovery on the notes. They have made payments in recognition of the contract; they have manufactured and sold the timber, and are not in a position to restore the consideration. They contracted to manufacture and sell the timber on the land, according to the evidence, not long after the trade, and their explanation seems satisfactory. They had put out large sums of money on the enterprise; and the witness Loomis states that he complained of the fraud before the note was due, but went on and cut the timber as the best and only thing to do to save themselves.

The fact, however, that they are not now in a position to rescind the trade and plead the fraud in bar of recovery on the notes, does not prevent them from setting up the fraud by way of counterclaim and recovering for the damages suffered. This may be done, though the defendants have made payments in recognition of the contract, and may have continued to manufacture and sell the lumber after knowledge of the fraud. *Trust Co. v. Auten* and *Parker v. Marquis, supra.*

The damages usually being the difference between the value of the property sold as it was and as it would have been if it had come up to the representations. The sale having been ratified, the plaintiff can maintain an action on the notes, subject to any counterclaim the defendants may have against the plaintiff, to be determined under the law as here declared and on the facts as they may be established.

There is error. The judgment will be set aside and a new trial awarded.

New Trial.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

SPRING TERM, 1906.

MIDGETT v. MANUFACTURING CO.

(Filed February 27, 1906).

Premature Nonsuits.

An intimation of an opinion by the judge adverse to the plaintiff upon some proposition of law, which does not "take the case from the jury," and which leaves open essential matters of fact still to be determined by them, will not justify the plaintiff in suffering a nonsuit and appealing. Such nonsuits are premature and the appeals will be dismissed.

ACTION by B. S. Midgett, Administrator, against Branning Manufacturing Co., for negligently causing the death of one Wade Leary, heard by *Judge T. J. Shaw* and a jury, at the Special Term, 1905, of the Superior Court of TYRRELL.

Certain issues as to negligence, contributory negligence, assumption of risk and damage were agreed upon and approved by the court for submission to the jury. Pending the

argument, the judge intimated what he would charge the jury upon a certain phase of the evidence. Whereupon the plaintiff took a nonsuit and appealed.

Aydlett & Ehringhaus and *J. B. Leigh* for the plaintiff.
W. M. Bond and *Pruden & Pruden* for the defendant.

BROWN, J. We are of opinion that the nonsuit was unnecessarily and prematurely taken, and without legal grounds to justify it. The right to suffer nonsuit in an action like this at any time is undisputed. But the plaintiff cannot appeal unless it appears that he was justified in it, or driven to it, by an adverse opinion of the court which would practically bar a recovery. An intimation of an opinion by the judge adverse to the plaintiff upon some proposition of law, which does not "take the case from the jury" and which leaves open essential matters of fact still to be determined by them, will not justify the plaintiff in suffering a nonsuit and appealing. Such nonsuits are premature and the appeals will be dismissed.

We suggest, however, to the judges of the Superior Court that it is advisable to refrain from giving such intimations in advance, as to what they will charge the jury unless their opinions go to the "root of the case" and practically bar a recovery. Such intimations may tend to mislead the plaintiff and induce him to suffer a premature nonsuit. It is best to proceed to charge the jury and let all the alleged errors excepted to during the trial come up for review. If the plaintiff is permitted to take a nonsuit and appeal whenever an adverse ruling is made during the trial, not necessarily fatal to his case, it is possible the same case may be brought to this court for review repeatedly, and numerous and unnecessary trials had in the court below. It is best that the case be "tried out" and then if an appeal is taken, all the alleged errors excepted to during the trial may be reviewed here.

In this case the judge, after the conclusion of the first speech by the plaintiff's counsel, intimated that he would instruct the jury "that if they believed the evidence introduced by the *defendant* upon the question of the contract between Campen and the defendant company, they should find that Campen was an independent contractor, and that if they find this to be true, the plaintiff could not recover." Upon this the plaintiff took a nonsuit and appealed. In this, the plaintiff was in error, he should have "gone to the jury" upon that disputed fact as well as upon the other important and material issues in the case. Then, if the verdict should be against him, all his rights would be preserved by exception, and the entire trial reviewed by this court. There are facts and circumstances in evidence by the plaintiff, upon which he might well have contended before the jury that Campen was practically the agent of the defendant and employed by it for a guaranteed sum to manage its mill. If His Honor had held that in any view of the entire evidence Campen was an independent contractor, and that therefore he would instruct the jury to answer the first issue "no," the plaintiff would have been justified in submitting to a nonsuit and appealing. But even then it would have been the better practice to have had the jury pass on the other issues, in order that the final determination of the case may be expedited, and thereby save costs and expense to the litigants as well as unnecessary labor to the courts. A verdict upon the other issues may have terminated the case without reference to Campen's status.

In *Tiddy v. Harris,* 101 N. C., 591, *Chief Justice Smith* states the rule as follows: "The practice has long prevailed that when the proofs are all in and the judge intimates an opinion that, under the old practice the plaintiff cannot recover or, under the new, fails to establish the issues necessary to his having judgment, he may suffer a nonsuit, and, by appeal, have the correctness of the ruling reviewed." To

the same effect are *Gregory v. Forbes,* 94 N. C., 221, and *Crawley v. Woodfin,* 78 N. C., 4.

In *Davis v. Ely,* 100 N. C., 286, *Chief Justice Smith* says: "It has been repeatedly held that appeals, fragmentary in their character, could not be allowed when the subject matter could be afterwards considered and any erroneous ruling corrected as well, without detriment to the appellant." In that case, however, under special circumstances the court set aside the nonsuit and ordered a trial of the cause.

We have recently considered this question in *Hayes v. Railroad,* 140 N. C., 131. In the disposition of that case, for the reasons given by *Mr. Justice Walker,* and on account of the prejudicial action of the court below during the trial and before the case was submitted to the jury, we felt impelled to exercise our discretion and follow the precedent set in *Davis v. Ely, supra,* and set aside the nonsuit and direct that the trial upon the whole case be proceeded with. In the opinion in *Hayes v. Railroad,* it is said: "In order to avoid appeals based upon trivial interlocutory decisions, the right thus to proceed (viz., to take a nonsuit and appeal) has been said to apply ordinarily only to cases where the ruling of the court strikes at the root of the case and precludes a recovery by the plaintiff. The plaintiff's right to take the course he did was challenged in this court, because the ruling did not cover the whole case, but left him ground upon which a recovery could be had. But we do not find it necessary to resort to said rule of practice in order to dispose of this appeal, and we do not therefore decide that it warranted or did not warrant the action of the plaintiff."

In this case, the contention was strongly presented that the nonsuit was premature and unnecessary. Being of that opinion, it is ordered that the appeal be dismissed and judgment be

Affirmed.

LIPSCHUTZ v. WEATHERLY.

(Filed February 27, 1906).

Contracts — Rescission and Cancellation — Substitution — Consideration — Waiver of Damages — Telegram — Evidence.

1. The defendant having introduced plaintiff's telegram, calling for an answer, it was competent to elicit from him whether or not he answered the telegram, without producing the telegram or accounting for its absence, no question being raised as to its terms.

2. A contract may be discharged by an express agreement that it shall no longer bind either party, provided it is supported by a valuable consideration, which may be either a payment in money, something of value, or by a release of mutual obligations arising out of the contract.

3. Where the defendant consented to the substitution of a new contract, the terms of which differed from the original, the release of the obligations of the old and the substitution of new obligations constitute valuable considerations.

4. Where the defendant consented to the cancellation or rescission of the original contract, in consideration of a substituted contract, his right to recover damages which had occurred prior to such rescission was waived or surrendered.

5. The release of controverted claims constitutes a valuable consideration.

ACTION by B. Lipschutz against W. H. Weatherly and others, heard before *Judge T. J. Shaw* and a jury, at the November Term, 1905, of the Superior Court of PASQUOTANK.

Plaintiff sued for the recovery of the price of cigars sold and delivered to defendants on July 10, 1904. Defendants admitted the sale and price and set up a counterclaim for damages for breach of contract. The evidence material to

the establishment and breach of the contract was in writing. On September 2, 1901, plaintiff and defendants entered into a contract whereby plaintiff agreed to sell to defendants cigars of a certain brand at $30 per thousand in lots of 5,000. "Terms of sale cash in ten days from shipment less two per cent discount. I agree to give said W & T. exclusive contract of the 44 cigars in all territory in North Carolina lying east of the Atlantic Coast Line R. R. Any orders received by me from that territory shall be turned over to said W. & T. The said W. & T. agree to advertise said cigars, I furnishing matter. This contract shall be binding so long as said W. & T. push the sale of said cigars." On May 28, 1904, plaintiff, by his attorneys, wrote defendants that by reason of non-compliance with the terms of the contract on their part he "has repudiated same, and in future will only sell such cigars to you as you may order on the same terms and conditions as they will ship the same to any other persons in your territory." The breach alleged by plaintiff was the failure by defendants to make payments in ten days. On June 2, 1904, plaintiff wrote defendants referring to the letter of his attorneys of May 28, saying, "And therefore of course we will make you no more shipments under that contract. We shall be more than pleased at any time in the future to sell you any of our cigars which you may desire; however, you can no longer have absolute territory and in the future we will sell goods to whomsoever we please in the territory formerly controlled by you. * * * If you care to handle our cigars on these terms, we shall be pleased to fill any orders which you may furnish. We will not, however, in the future give you any commissions on any goods ordered by any parties in the territory formerly controlled by you, and we reserve the right to ship and sell to whomsoever we please." After some further correspondence, plaintiff, on June 6, 1904, declined to fill an order of defendants until defendants sent to him a telegram dictated by plaintiff, in these words, "We agree to cancella-

tion of previous contract. Ship goods as per terms of your last letter to us." Defendant Weatherly was asked, on cross-examination, whether he sent plaintiff telegram in language above quoted. The telegram was not produced nor was its absence accounted for. Defendants' objection being overruled, he answered affirmatively, to all of which defendants duly excepted. Defendant Weatherly testified that prior to May 28, 1904, they had complied with the contract—had advertised the cigars, gave up handling other cigars. That they were wholesale dealers in groceries, cigars and tobacco—had salesmen on the road selling to their customers—furnished them with sample boxes to give away—worked this cigar almost exclusively; had built up a good trade. On a few occasions checks were not sent in ten days—heard no complaint from plaintiff. Defendants sold the cigars for $35.00 per thousand. Telegram was sent in reply to one from plaintiff of June 9, 1904. Defendants introduced evidence showing sales of cigars by plaintiff's salesman within the territory east of the A. C. L. Railroad prior to May 28, 1904. Plaintiff introduced no evidence. The court charged the jury that if they believed the evidence they should answer the second issue "Yes" and the fifth and sixth "Nothing." Defendants excepted. The jury having answered the issues as directed by the court, judgment was signed for plaintiff, to which defendants duly excepted and appealed.

Pruden & Pruden, Shepherd & Shepherd and *W. A. Carr* for the plaintiff.

Aydlett & Ehringhaus for the defendants.

CONNOR, J., after stating the facts: Defendants' first exception, pointing to the submission of the second issue, is presented upon their exception to His Honor's charge and will be considered in that connection. The second exception to the admisison of defendant Weatherly's statement that he

sent the telegram in reply to plaintiff's of June 9, 1904, cannot be sustained. The defendants, having introduced plaintiff's telegram calling for an answer, it was clearly competent to elicit from him whether or not he answered the telegram. There is no rule of law requiring the agreement to rescind or cancel such a contract as existed between the parties to be evidenced by any writing. Certainly the defendant, having shown a notice on the part of plaintiff that he had elected to rescind could have been asked the general question whether defendants assented to the rescission. If any question had arisen in regard to the terms of the language of the telegram, it would have been necessary to produce it or to account for its absence. The testimony simply showed, by the admission of defendant Weatherly, that he sent a telegram in the language suggested by plaintiff. The exception cannot be sustained. The real controversy between the parties is presented by defendants' contention. 1st. That conceding the facts to be as shown by the correspondence, there was no valid rescission of the original or substitution by new contract, for that the agreement to rescind is not supported by any valuable consideration. 2nd. That if there was a rescission by mutual consent, their right to recover damages sustained prior to the breach was not waived or surrendered. It is well settled that a contract may be discharged by an express agreement that it shall no longer bind either party. This is usually and correctly termed a rescission. It is equally well settled that such an agreement to operate as a discharge must be supported by a valuable consideration, which may be either a payment in money, something of value, or by a release of mutual obligations arising out of the contract. In *Brown v. Lumber Co.*, 117 N. C., 287, it is said: "When the contract is wholly executory, a mere agreement between the parties, that it shall no longer bind them is valid, for the discharge of each by the other, from his liabilities under the contract is a sufficient consideration of the promise of the other to forego his rights.

* * * If a contract has been executed on one side, an agreement that it shall no longer be binding, without more, is void for want of a consideration. Clark on Contracts, 418. Of the several methods by which a contract may be discharged, one is by substitution of a new contract, the terms of which differ from the original. In such cases the release of the obligations of the old and the substitution of new obligations constitute valuable considerations." "It is also now well settled that ordinarily a written contract, before breach, may be varied by a subsequent oral agreement, made on a sufficient consideration, as to the terms of it which are to be observed in the future. Such a subsequent oral agreement may enlarge the time of performance, or may vary other terms of the contract, or may waive and discharge it altogether." *Hastings v. Lovejoy,* 140 Mass., 261. In *McCreery v. Levy,* 119 N. Y., 1, *Andrews, J.* says: "The agreement annulling the prior contract is supported by an adequate consideration. The new obligation which G assumed under the contract of October 25, 1882, was alone a sufficient consideration. There was a consideration also in the mutual agreement of the parties to the prior contract which was still executory, although in the course of performance, to discharge each other from reciprocal obligations thereunder and to substitute a new and different agreement in place thereof." The principle is well illustrated in *Dreifus Block Co. v. Salvage Co.,* 194 Penn., 475. Assuming that the determination of the plaintiff to rescind the contract, as communicated by him to defendants on May 28, was a breach of its terms, the defendants may have stood by their rights under the contract and sued for such damages as they sustained. Instead of doing so, they desired to continue purchasing cigars from plaintiff, who refused to sell on any other terms than an assent to the rescission. The defendants elected to assent to plaintiff's terms, deeming it conducive to their interests to do so. The status of the parties at this time is well illustrated by what is said by Mr. *Justice*

Dean in *Dreifus Co. v. Salvage Co., supra.* In speaking of the breach of a contract by defendant to deliver steel at a fixed price, he said: "Assume * * * that there was a distinct declaration that the company would not perform its contract; still if anything can be clear, it is, that above all things, plaintiff did not want a law suit for damages; at that stage, their damages were wholly uncertain, depending on the fluctuating price of steel; they did know they wanted the steel; what damage they might want by reason of defendants' breach, or what they might sustain, they did not know. In this dilemma they sought for and obtained a new contract expressly cancelling the old * * * They agreed to accept a fixed quantity and quality of merchandise at fixed times and prices, instead of the uncertain event of a law suit." In *Goebel v. Linn,* 47 Mich., 489, plaintiff had made a contract to furnish defendant, who was a brewer, ice, during the season at a fixed price. During the life of the contract he notified defendant that he would not furnish any more ice unless defendant paid a very much larger price. Defendant, after protesting, assented to the change in price and purchased the ice at the price for which the action was brought. He set up, as a defense, that the note for the price of the ice, was without consideration, etc. *Cooley, J.,* said that the defendant had a right to refuse to buy ice at the advanced price and sue for damages for the breach of the contract. "But defendants did not elect to take that course. They chose, for reasons which they must have deemed sufficient at the time, to submit to the company's demand and pay the increased price rather than rely upon their strict rights under the existing contract." We are of the opinion that the defendants elected to consent to the cancellation or rescission of the original contract, in consideration of the substituted contract by which plaintiffs agreed to sell them cigars upon the terms set out in the letters of May 28, and June 6, 1904, and the telegram of June 9, and that this consent was based upon a valuable considera-

tion. The defendants say that conceding this to be true, their right to recover damages which had accrued prior to such rescission was not affected thereby. Certainly after a contract is discharged, either by rescission or substitution of a new contract, no action can be maintained on the original contract. For any benefits accruing to either party by performance of the contract, unless expressly released, an action as upon a *quantum meruit,* if it be labor performed, or *quantum valebat,* if property received, may be maintained. It is, not upon the contract, but upon an implied *assumpsit.*

In *Dreifus Co. v. Salvage Co., supra,* it is said: "The term cancellation of a contract implies a waiver of all rights thereunder by the parties. If, after a breach by one of the parties, they agreed to cancel it and make a new contract with reference to its subject matter, that is a waiver of any cause growing out of the original breach, and this is the rule even though the original contract was under seal." We have discussed the case upon the assumption that the plaintiff made the first breach of the contract. It is by no means clear that, upon the admitted failure by defendants to pay the bills for cigars within ten days, plaintiff was not released from further performance on his part. It is often difficult to say when, in a bi-lateral contract such as this, stipulations are of the essence of the contract and the failure to perform them releases the other party from further performance. However this may be, there was certainly sufficient doubt to sustain the agreement to rescind or substitute a new contract. It is well settled that the release of controverted claims constitutes a valuable consideraion. It may well be that defendants preferred to enter into the new contract for the purpose of securing the cigars with which to supply their trade, rather than engage in litigation of doubtful result. However this may be, they did so elect, and having procured the cigars upon their express agreement to rescind the original contract, they have no just right to complain if required to do so. If they intended

reserving any demand for damages, common fairness required them to say so. Upon an examination of the entire record we find no error.

The judgment must be

Affirmed.

KNOWLES v. SAVAGE.

(Filed February 27, 1906).

Evidence—Nonsuit—Judgment "Out of Term"—Power of Court—Verdict.

1. In an action for damages for negligently failing to store and sell peanuts, where there was evidence from which the jury could have reasonably drawn the conclusion that the defendant had failed in the discharge of his duty to safely store the property, a motion to nonsuit was properly overruled.

2. An agreement empowering the judge to sign judgment "out of term," gave him no power after the adjournment of the term to hear and pass upon a motion to set the verdict aside.

ACTION by A. T. Knowles against Savage, Son & Co., heard by *Judge T. J. Shaw* and a jury, at the Fall Term, 1905, of the Superior Court of WASHINGTON. From a judgment for the plaintiff, the defendant appealed.

Ward & Grimes for the plaintiff.

W. C. Rodman for the defendant.

CONNOR, J. Plaintiff shipped to defendant, a commission merchant in Norfolk, a quantity of peanuts for storage and sale. Plaintiff alleged that he negligently failed to store and sell the peanuts, by reason whereof he sustained damage. The defendant upon conclusion of the evidence moved for judg-

ment of nonsuit. The motion being denied, defendant excepted. The court submitted the cause to the jury under instructions to which there was no exception. There was evidence on behalf of the plaintiff that the peanuts were in good condition when delivered to defendant—that they were dry and cured. The evidence in this respect was conflicting. His Honor's instruction to the jury in regard to the degree of care required to be exercised by the defendant is not set out, there being no exception thereto. The defendant contends that there was no evidence of negligent storage by him. It must be conceded that if the jury had credited the testimony offered by defendant, it fully exonerated him from any liability. The plaintiff's testimony, on the contrary, which was accepted by the jury, showed that the peanuts were in good condition when shipped to defendant on January 2, 1904, and plaintiff testified that "if they had been properly stored and cared for they would have remained in same condition as when received by him." It seems from the correspondence that on or about January 25, 1904, defendant made sale of the peanuts to be delivered in ten days. That when he undertook to deliver them they were found to be "thoroughly mixed with peanuts that were not merchantable. There were some good ones in them and it looked as if they were mixed with rotten ones." This is the testimony on the part of defendant of the purchaser who rejected them. The motion to nonsuit was of course based upon the admission that the plaintiff's evidence was all true and must be so considered by us. There was an irreconcilable conflict and the jury alone could settle the controversy. We cannot say that there was an absence of evidence from which the jury could not have reasonably drawn the conclusion that the defendant had failed in the discharge of his duty to safely store and care for the property. We must assume, in the absence of any suggestion to the contrary, that His Honor correctly instructed the jury in regard to the measure of duty imposed upon the defendant. The record states

that counsel, desiring to leave the court pending the deliberation of the jury, agreed that upon the return of the verdict, the judge could sign judgment "out of term." That neither of the counsel were present at the rendition of the verdict. The court announced from the bench that it would set the verdict aside if any one was present to make the motion. That while the judge was in another county, counsel, by letter, requested him to set the verdict aside, which he declined, because, in his opinion he had no power to do so after the expiration of the term. From a judgment upon the verdict defendant appealed, assigning as error the refusal of the court to grant his motion to nonsuit plaintiff, and the refusal to set the verdict aside. Neither exception can be sustained. It is conceded that a motion to set aside the verdict for insufficient evidence must be made before the judge, who tried the case upon his minutes and at the same term at which the trial is had. Revisal 554; *Moore v. Hinnant,* 90 N. C., 163. It is equally clear that unless otherwise agreed, the judgment must be signed during the term. The defendant contends that the agreement empowering the judge to sign the judgment after adjournment included the power to hear and determine the motion to set the verdict aside. We do not concur in this view. Such is not a reasonable construction of the agreement. Signing the judgment involved no judicial discretion or ruling. This, if omitted for any reason, could be done at a succeeding term. *Ferrell v. Hales,* 119 N. C., 199. Hearing and determining a motion to set the verdict aside is quite another matter—involving recollection of the testimony, manner and demeanor of witness and other incidents of the trial not likely to be impressed upon the memory of the judge that he may safely act upon them after adjournment. While convenience of counsel often occasion and usually justify outside agreements of the character made in this case, they frequently lead to confusion and irregularity in the administration of justice. The courts will not by construction extend

their terms beyond the fair and reasonable import of the language used. We concur with His Honor that he had no power after the adjournment of the term to hear and pass upon the motion.

The judgment must be

Affirmed.

SMITH v. LUMBER CO.

(Filed February 27, 1906).

Judgment—Estoppel—Pleadings—Question for Jury.

1. In order to derive any benefit from a former judgment as a bar to the prosecution of a pending suit, such judgment, even in actions before a justice of the peace, must be specially pleaded and will not be considered under the plea merely denying the indebtedness alleged in the complaint.

2. Where there is any evidence that reasonably tends to prove the fact in issue, or where the credibility of the witnesses introduced by either party must be passed upon, the question of fact involved is always one for the jury under proper instructions from the court as to the law.

ACTION by John T. Smith against Cashie & Chowan Railroad & Lumber Co., heard, on appeal from a Justice of the Peace, by *Judge R. B. Peebles* and a jury, at the September Term, 1905, of the Superior Court of BERTIE.

The plaintiff sued before a justice of the peace to recover the sum of $150, the balance due for services. In his complaint he alleged that the defendant owed him $150 for two months' work at $75 per month. The defendant simply denied that it owed the plaintiff anything. The plaintiff testified that on February 5, 1905, the defendant employed him to buy lumber trees for it, for which service he was to receive

$75 per month, payable at the end of each month, and it was agreed that the employment should last four months. At the end of the first month, that is, about March 5, the defendant paid the plaintiff for that month $75 and without lawful excuse discharged him. For the sole purpose of showing that the justice had jurisdiction of this case, the plaintiff was permitted, over the defendant's objection, to show that after June 10, 1904, when all the instalments of his salary were overdue, he sued the defendant before a justice of the peace for that part of the salary, $75, due for the month ending April 5, 1905, and recovered judgment for the same, which was paid by the defendant, leaving a balance of $150 due. The defendant admitted that it employed the plaintiff at $75, but introduced evidence to show that he was employed for one month only. In this connection, Mr. Smith, a witness for the defendant, testified that the plaintiff was not hired for four months, but for only one month, and that he was paid for that month, and contended for nothing further than the salary paid to him at the end of the first month. The issues submitted to the jury with their answers were as follows: 1. Did the defendant hire the plaintiff for the term of four months at $75 per month? Yes. 2. Did the defendant unlawfully discharge the plaintiff from its employment after the first month? Yes. 3. Is the defendant indebted to the plaintiff, and if so, to what amount? Yes; $100, with interest from June 5, 1904, until paid.

The defendant's counsel requested the court to give the following instruction to the jury: "When the plaintiff sued for and collected his one month's wages under his judgment, he was by that estopped to sue for the balance because his contract was entire and not divisible, and suing for less than the amount of the whole claim was in law a decision of what was due him in full." The court refused to give the instruction and the defendant excepted.

Upon the second issue, the court charged the jury that "If

the first issue was answered 'yes,' the second issue should be answered 'yes,' for upon that issue the burden was upon the defendant, and it had offered no evidence to justify the discharge, if the contract was for four months." Judgment on the verdict was rendered for the plaintiff and the defendant appealed.

Day, Bell & Dunn and *J. B. Martin* for the plaintiff.
Francis D. Winston and *St. Leon Scull* for the defendant.

WALKER, J., after stating the case: The defendant relied upon the judgment recovered before the justice of the peace for the second month's instalment of salary as a bar to this action, and assigns as a reason why it should have this effect that there was a single contract to pay a salary by monthly instalments, and as all the instalments were over-due at the time the suit was brought and the judgment rendered, the plaintiff was required to sue for all of them in one action and could not make any one instalment the subject of a separate suit and obtain judgment for it, without losing the right to recover for the others. The interesting question thus raised in the argument is fully discussed in *Jarrett v. Self,* 90 N. C., 478, and that case has since been cited with approval in *Kearns v. Heitman,* 104 N. C., 332, and *McPhail v. Johnson,* 109 N. C., 571. But the pleadings do not present this matter for our consideration and we do not therefore pass upon it. In order to derive any benefit from a former judgment as a bar to the further prosecution of a pending suit, it must be properly pleaded, as such a defense is not covered by a plea of the "general issue" or anything that is equivalent to it. It is provided by statute that the answer shall contain a denial of the complaint, or of any part thereof, and also a statement in a plain and direct manner of any facts constituting a defense or counterclaim, Revisal, section 1460. This court has repeatedly held that such defensive matter as is now

relied on, even in actions before justices of the peace, must be specially pleaded and will not be considered under a plea merely denying the indebtedness alleged in the complaint. The cases in which this rule was laid down were not materially different in their facts from the case at bar. Indeed, in several of them, the facts were substantially identical. *Blackwell v. Dibbrell,* 103 N. C., 270; *Hicks v. Beam,* 112 N. C., 644; *Montague v. Brown,* 104 N. C., 161; *Cotton Mills v. Cotton Mills,* 115 N. C., 487; *Curtis v. Piedmont Co.,* 109 N. C., 405; *Harrison v. Hoff,* 102 N. C., 128; *Hawkins v. Hughes,* 87 N. C., 115. Assuming that there was proof in this case, as the defendant's counsel contended there was, that a judgment for the second instalment had previously been recovered before a justice of the peace, the court below could not have based an instruction upon it, as it is a well settled principle that there must be allegation as well as proof, and they must correspond. In this case the defendant merely denied that he owed the plaintiff, and did not specially plead the former judgment. There was no motion to amend, and, in the present state of the pleadings, the court was clearly right in refusing the defendant's prayer for instructions, if we are to follow established precedents. But there was an error committed in that portion of the charge upon the second issue, which is set out in our statement of the case. It is apparent from this instruction the court assumed that the defendant had discharged the plaintiff. An affirmative answer to the first issue did not necessarily call for the same kind of answer to the second issue. Besides, the evidence relating to the discharge of the plaintiff by the defendant was not all one way, and even if it had been, it was for the jury to find the fact, and in order to do so, to pass upon the credibility of all the witnesses. The testimony of the witness Smith was proper for the consideration of the jury upon this issue. Even if it may fairly be regarded as slight, it is yet, without taking into account the excluded portion, some evidence of the fact

that the plaintiff had quit the service of the defendant voluntarily. In no view of the testimony do we think the court's peremptory instruction upon the second issue can be sustained, for where there is any evidence that reasonably tends to prove the fact in issue, or where the credibility of the witnesses introduced by either party must be passed upon, the question of fact involved is always one for the jury under proper instructions from the court as to the law.

The error in the charge entitles the defendant to another trial.

New Trial.

JENKINS v. HOLLEY.

(Filed February 27, 1906).

Statute of Frauds—Debt of Third Person—Contracts.

The statute of frauds (Rev., sec. 974,) does not forbid an oral contract to assume the debt of another, who is thereupon discharged of all liability to the creditor, the promisor thus becoming sole debtor in his place and stead.

ACTION by J. T. Jenkins against T. D. Holley, heard on appeal from the justice of the peace, by *Judge R. B. Peebles* and a jury, at the September Term, 1905, of the Superior Court of BERTIE.

One Wilson, a colored man, was indebted to Jenkins in the sum of $20, for advances, which he agreed to pay or work out. Wilson got employment from defendant Holley and brought him to see Jenkins. The plaintiff testified: "Holley asked if Wilson owed me and how much. I told him I had a paper in which the said Wilson had agreed to pay me in thirty days or do that amount of work. He asked to see the paper and said that Wilson was going to work with him

to pay him and he wanted to write one by it. I handed him the paper and he said, 'I will pay you. You need not look to Wilson.' I asked him when he would pay me and he said, 'On Saturday next.' I replied, 'Mr. Holley, that is all right; I do not look to Wilson for pay, but look to you.' Holley replied to this, 'All right. You look to me; I will pay you.' And Holley took the paper and he and Wilson went off. I asked Holley for pay several times and he did not pay me and I sued him."

Wilson testified: "I owed Jenkins $20. He demanded the cash or work. I told him that I would get Holley to pay him, that I was working for Holley. I saw Holley and he agreed to do so, and saw Jenkins and Jenkins agreed to look to Holley for it. I have not paid Jenkins. The promise of Holley was not evidenced by any writing."

Upon the close of this evidence, the court nonsuited the plaintiff on the ground that the promise of Holley was not in writing.

Francis D. Winston and *J. H. Matthews* for the plaintiff.
Day, Bell & Dunn and *J. B. Martin* for the defendant.

CLARK, C. J., after stating the case: The provision of the statute of frauds (now Revisal, section 974,) which requires a "special promise to answer the debt, default or miscarriage of another" to be in writing, applies only to invalidate verbal agreements to be surety for the debt, etc., of another for which that other remains liable. It does not forbid an oral contract to assume the debt of another, who is thereupon discharged of all liability to the creditor, the promisor thus becoming sole debtor in his place and stead. *Haun v. Burrell,* 119 N. C., 547; *Whitehurst v. Hyman,* 90 N. C., 489. The point was clearly restated last term by *Hoke, J.,* in *Sheppard v. Newton,* 139 N. C., 533.

The language here used to plaintiff by Holley—"I do not

look to Wilson for pay, but look to you"—and Holley's reply —"All right, you look to me; I will pay you on Saturday next"—was very strong, if not indeed conclusive evidence, and is strengthened by Wilson's testimony. The evidence offered by plaintiff should have been left to the jury, with any evidence the defendant might offer, upon the issue whether Holley became sole debtor, or was merely responsible if Wilson did not pay.

A promise to assume the debt of another, who is thereupon released, need not be in writing. *Mason v. Wilson,* 84 N. C., 51. The arrangement that Wilson was to work for Holley instead of Jenkins, was consideration to support the promise. The surrender of the paper is not conclusive evidence, of itself, for the defendant contends that this was only for the purpose of making a copy. But upon the whole evidence the case should not have been withdrawn from the jury by a nonsuit.

Error.

BOND v. MANUFACTURING CO.

(Filed February 27, 1906).

Deeds—Mental Capacity.

1. In an action to vacate a deed on the ground of mental incapacity, there was no error in refusing plaintiff's prayer that "it requires more mental capacity to execute a deed than a will and while it is sufficient proof to show that a person knows the nature of the property he undertakes to will away and to whom he wills it, that amount of mental capacity alone will not be sufficient in a person undertaking to execute a deed."

2. To execute either a will or a deed the party must have sufficient mental capacity to understand what property he is disposing of, the person to whom he is giving or selling, and the purpose for which he is disposing of the property.

ACTION by Stewart Bond and others against Branning Manufacturing Co. and others, heard by *Judge B. F. Long* and a jury, at the Fall Term, 1905, of the Superior Court of BERTIE.

This was an action to vacate and avoid a deed made by the ancestor of plaintiff to defendant John Darden, who thereafter conveyed the land and timber on the land to defendant, Branning Manufacturing Company. Plaintiff urged mental incapacity on the part of the grantor and undue influence by the defendant grantee. By consent the issue in regard to the second cause of action was answered in the negative. The jury answered the other issues for the defendant. From a judgment for the defendant, the plaintiff appealed.

St. Leon Scull for the plaintiffs.
Winston & Matthews for the defendant.

CONNOR, J. But two exceptions were urged in this court. The plaintiff requested the court to instruct the jury: "It requires more mental capacity to execute a deed than a will, and while it is sufficient proof to show that a person knows the nature of the property he undertakes to will away, and to whom he wills it, that amount of mental capacity alone will not be sufficient in a person undertaking to execute a deed." His Honor declined to give the instruction and the plaintiff excepted.

There are several objections to the instruction. There was no issue involving the several degrees of mental capacity suggested. No will had been made, nor was there any effort to set up a will by setting aside a deed. It would not aid a jury who were inquiring in respect to the capacity to make the deed in controversy, to inquire into an entirely collateral question. It is true, as contended by defendant's counsel in his well prepared brief, that courts have used the expression that it required less mental capacity to make a valid will than a

deed. We find, however, by a careful examination of the cases cited, that the expression has been used upon trials of an issue *devisavit vel non* and as illustrative of the capacity requisite to the execution of a will, rather than the announcement of a principle of law. In the cases cited from West Virginia, the instruction was given and sustained. We find no case in which it has been held error to refuse to give it. It is entirely competent for counsel to argue the proposition as illustrative of the degree of capacity necessary to the execution of a will, but we cannot see how it would, if established and accepted by the jury as correct, aid them in answering the question propounded, whether the grantor had sufficient capacity to execute the deed to the defendant. It is elementary that instructions involving abstract propositions of law, having no reasonable connection with or bearing upon the testimony, should not be given and that it is not error to refuse such instruction. It is by no means clear that the expression, carefully considered, is correct. To execute either a will or a deed, it is abundantly established that the party must have sufficient mental capacity to understand what property he is disposing of, the person to whom he is giving or selling and the purpose for which he is disposing of the property. In *Smith v. Beatty,* 37 N. C., 456, it is said: "Weakness of mind alone, without fraud, does not appear to be a sufficient ground to invalidate an instrument. It is said that a court of equity will not measure the size of people's understandings. Excessive old age, with weakness of mind, may be a ground for setting aside a conveyance obtained under such circumstances. But, old age alone, without some proof of fraud, will not invalidate a transaction." *Rippy v. Gant,* 39 N. C., 443; *Suttles v. Hay,* 41 N. C., 124. These were cases in which it was sought to set aside deeds. We are unable to see any good reason why a different standard of mental capacity should be established for the execution of a will and a deed. It is apparent that a court would scrutinize with more care and hold the

grantee to a stricter account to show fair dealing, or rebut any presumption of undue influence, than a devisee, but in the ultimate decision of the question of capacity, the standard is or should be the same—was the execution of the paper the free voluntary act and deed of the party, knowing what he was doing? The question of undue influence or fraud is eliminated by the consent of the plaintiff to the answer of the issue upon that question. The sole question is one of fact—whether at the time the grantor executed the deed, he had sufficient mental capacity to understand what he was doing. This is the standard laid down by this court in *Horne v. Horne,* 31 N. C., 99; *Lawrence v. Stitt,* 66 N. C., 584. In *Paine v. Roberts,* 82 N. C., 451, *Smith, C. J.*, said that the standard fixed by the law was that the party "knows what he is about." We are not cited to any case in which this court has made or recognized the distinction; on the contrary, our investigation discloses a clear rejection of it in *Barnhardt v. Smith,* 86 N. C., 473, in which *Smith, C. J.*, says: "The rule laid down by *Lord Coke* 'that the person must be able to understand what he is about,' approved in *Moffit v. Witherspoon,* 32 N. C., 185; *Horne v. Horne,* 31 N. C., 99, and more recently in *Paine v. Roberts,* 82 N. C., 451, as a general and practical rule for the guidance of juries, approximates an accurate statement of the law as to the degree of mental capacity required to make a valid disposition of property as the subject will admit." This case involved the validity of a deed. *Bost v. Bost,* 87 N. C., 477; *Horah v. Knox, ibid.,* 483; *Williams v. Haid,* 118 N. C., 481; *Cameron v. Power Co.*, 138 N. C., 365. There was no error in refusing the plaintiff's prayer. The exception to the instruction given was not pressed. We have examined it and find that it is in strict accordance with the settled law of this State. The grantor provides for the payment of a mortgage indebtedness which was outstanding and threatening to deprive him of his home; he also provided for

the support of himself and his wife. There is no suggestion that the grantee did not fully discharge his duty in the matter.

The judgment must be
Affirmed.

SMITH v. NEWBERRY.

(Filed February 27, 1906).

Justice's Court—Pleadings—Trial—Joinder of Causes of Action—Breach of Warranty—Deceit—Issues—Plea in Confession and Avoidance—Evidence—Instructions.

1. When the parties come to trial in a justice's court, the justice should require the plaintiff to state "in a plain and direct manner the facts constituting the cause of action" and a denial by defendant or other facts constituting a defense.

2. Where two causes of action were set forth in a warrant before a justice of the peace (treated as a complaint), the judge properly submitted the issue upon the cause of action which was sustained by the evidence.

3. While an action for breach of warranty arises out of contract and deceit is for a tort, yet when they both arise out of the same transaction they may be joined.

4. The general rule is, that in the absence of a request by the complaining party, an exception will not lie to the failure to submit issues.

5. A defense in the nature of a plea in confession and avoidance must be specially pleaded.

6. In an action for damages for breach of warranty, where defendant's evidence was material to be considered by the jury upon the issue in regard to damages, a charge, that the jury might consider this evidence in making up their minds as to whether there was a warranty and breach thereof, is reversible error.

SMITH *v.* NEWBERRY.

ACTION by Thomas Smith against Y. Z. Newberry and another on appeal from the justice of the peace, heard by *Judge E. B. Jones* and a jury, at the Fall Term, 1905, of the Superior Court of CARTERET.

This was an action for breach of warranty in the sale of a horse. There were no pleadings, oral or written. The only indication of the plaintiff's cause of action is found in the warrant or summons issued by the justice of the peace, in which the defendant is commanded to appear and "answer the complaint of Thomas Smith for deceit and breach of warranty and false warranty in that the defendants fraudulently warranted a horse which they sold to plaintiff for ——— to be one which would not kick, when, in fact, he did kick, and the defendants well knew said horse would kick, to the plaintiff's damage in the sum of fifty dollars."

The return on appeal of the justice does not contain any statement of the plaintiff's complaint or the defendants' answer—simply stating that judgment was rendered, etc. The cause was tried on appeal to the Superior Court upon three issues, submited by the court as follows:

"1. Did the defendants warrant the horse not to kick?

"2. Was there a breach of said warranty?

"3. What damage has plaintiff sustained?"

Defendants objected to the first and second issues and requested the court to submit issues as in an action for deceit, etc. To the refusal to do so, defendants excepted. The jury having answered the issues in the affirmative and assessed the damages at $35, judgment was rendered accordingly and defendants appealed.

Simmons & Ward for the plaintiff.
D. L. Ward for the defendants.

CONNOR, J. The defendants urged two exceptions in this court. The first was to the refusal of His Honor to submit

the issue as for a deceit and to charge the jury that the plaintiff must show a *scienter*. Confusion, in respect to the character of the action, grows out of the failure of the justice to observe the requirement of section 1459, Revisal, that "The complaint must state in a plain and direct manner the facts constituting the cause of action." This may be done orally and is not required to be "in any particular form, but must be such as to enable a person of common understanding to know what is meant." Section 1463. The form in which the justice should make his docket entries, noting the pleadings, etc., is prescribed by section 1496 (No. 38), and the "Return to notice of appeal," *ibid.,* (No. 40). It is usual in the summons to indicate in general terms, the basis of the demand whether for non-payment of an amount due on account or promissory note or for damages for breach of contract, but when the parties come to trial the justice should require them to state "in a plain and direct manner the facts constituting the cause of action"—and a denial by defendant or other facts constituting a defense. Large power of amendment is vested in the Superior Court, limited only by the condition that the amendment show a cause of action within the jurisdiction of the justice. *Mfg. Co. v. Barrett,* 95 N. C., 36; *Planing Mills v. McNinch,* 99 N. C., 517. Treating the warrant as a complaint, two causes of action are set forth—breach of warranty and deceit. If the deefndants had so desired they might have called upon the plaintiff to make his complaint more specific, either in the justice's court or after the case reached the Superior Court upon appeal. Revisal, 496; cases cited in Clark's Code, section 261. In the absence of any more definite pleadings or any motion to make them so, His Honor properly submitted the issue upon the cause of action which seemed and, as the jury found, was sustained by the evidence. If the plaintiff was content to rely upon a cause of action entirely contractual in which he could call only for execution against the property of the de-

fendants, and waive the cause upon which he may have had an execution against the person, we do not see how the defendants can complain. The evidence did not show any *scienter* and if an issue had been submitted upon the deceit His Honor would have been justified in so instructing the jury. We do not understand the defendants as contending that the two causes of action could not be joined, or were not within the jurisdiction of the justice. If they desired to raise the first objection they should have demurred for misjoinder and if the second for want of jurisdiction. It is sufficient to say that neither objection could have been sustained. While it is true that an action for breach of warranty arises out of contract and deceit is for a tort, when they both arise out of the same transaction they may be joined. *Solomon v. Bates,* 118 N. C., 311. We find no error in His Honor's ruling in this respect. The second exception is directed to His Honor's charge. Plaintiff testified to the transaction, the warranty and breach. He says that after driving the horse, which was the subject of the controversy, he returned to defendants." "He refused to exchange. I left the man there and went home. I came back and tried to compromise. They got cart and harness and my pony." Defendant Newberry testified to the transaction, denying warranty, etc. After describing manner in which plaintiff drove the horse away, he says: "He came back and I swapped him another mare and he paid me $10 to boot. I told him when he came first here were his papers, and now take the cart and harness and go. He said 'no.' He came to trade and he was going to trade. I finally did get him another horse for $10 to boot. He gave me road cart and harness for $5 of $10 to boot, and gave note for another $5. He then brought this mare back and said his wife said they could not raise the money for the mare. I kept the mare and bought the pony." Plaintiff introduced no evidence in reply to the foregoing testimony. His Honor, after reciting this portion of defendant's testimony, said:

"The court charges you that you may consider this evidence in making up your minds as to whether there was a warranty and a breach as contended by plaintiff." Defendants excepted.

We are unable to see how this testimony cast any light upon the question whether there was a warranty. It was most material upon two other phases of the controversy. If true, it tended to show a new contract substituted for the original one in which the jury found there was a warranty. Plaintiff says that when he found that the horse kicked he carried it back "and tried to compromise." He concludes his testimony with the statement "They got cart and harness and my pony." The defendant testifies that he did make a new trade with plaintiff, taking the mare back and giving him another one for ten dollars to boot, a part of which was paid by the delivery of "cart and harness," and that a second arrangement was made by which, at the request of the plaintiff, he took the mare back. If all of this is true, whatever rights the plaintiff had under the original contract, were surrendered by the second and third contracts. It is but common fairness to require men to deal frankly with each other and when new and substituted contracts are made, to say whether they intend to reserve controverted claims and demands growing out of the original transaction. It may well be that in making the second trade, both parties took into account the conditions attaching to the first. If they did not do so, they should have said so. The defendants are confronted with the difficulty that no issue was asked upon this phase of the testimony, and while there are a few carefully guarded exceptions, the general rule is that in the absence of a request by the complaining party, an exception will not lie to the failure to submit issues. The testimony presented a defense in the nature of a plea in confession and avoidance. We have held, at this term, *Smith v. Lumber Co.*, following other decisions, that a defense of this character must be specially pleaded. We think, however, that the testimony was material to be con-

sidered by the jury upon the third issue in regard to damages. While, for the reasons stated, the defendants are precluded from using the testimony in bar of the action, and that upon the finding on the first and second issues they are in any aspect liable for nominal damages, they should be permitted to have the jury consider the testimony upon the damage sustained by the breach of the warranty. If, by the second trade, the plaintiff accepted in exchange for the mare which kicked, another mare, for which he paid ten dollars to boot, of the full value of the consideration paid for the first mare, his damage for the breach of the warranty would be but nominal. While it is true that in the absence of any request to do so, the failure of the judge to present this phase of the testimony could not be assigned as error, yet, when he undertakes to instruct the jury in respect to the testimony and commits an error, it is reviewable upon exception. The jury gave the plaintiff $35 damage, which was about the value of the pony, less the mortgage upon it paid by defendants. It is evident that no consideration was given to the testimony of defendant upon the second trade. We have felt embarrassment in disposing of this appeal by reason of the condition of the record. We find that a very large bill of cost has accumulated. The case presents a striking illustration of the danger of departing from well settled rules of pleading. If at the beginning the parties had been brought to a simple statement of their controversy and the real issues fairly presented, the long delay—three years—and the large expense incurred, would have been saved. The purpose of The Code system of pleading is to bring the parties at their entrance into court to an issue either of law or fact and a speedy trial upon the merits. We feel constrained to remand this case for a new trial to the end that the jury be instructed to consider the evidence of defendant Newberry—with such other evidence as may be introduced, upon the question of plaintiff's damage. The cost of this court will be divided equally between the parties.

New Trial.

SHEPARD v. RAILROAD.

(Filed February 27, 1906).

Railroads—Cattle Guards—Towns—Stock Law—Deed to Right of Way.

1. Section 2601, Revisal, which requires railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands, applies to a town lot as well as in the country and to stock law and non-stock law territory.

2. The adoption of the stock law does not abrogate in such locality a general statute or rule of law.

3. A deed to the right of way gives a railroad no more rights than it would have acquired by condemnation.

ACTION by Wm. B. Shepard against Suffolk & Carolina Railroad Company, heard by *Judge G. W. Ward* and a jury, at the Fall Term, 1905, of the Superior Court of CHOWAN. From a judgment for the plaintiff, the defendant appealed.

C. S. Vann for the plaintiff.
Pruden & Pruden for the defendant.

CLARK, C. J. The plaintiff owned a lot of two acres in the town of Edenton which was enclosed and used by him to pasture cows and horses. He conveyed a right of way through it to defendant railroad company who tore down the fence beyond the right of way and failed to erect a cattle guard at the entrance and exit to the lot. The plaintiff sued for damages to the fence and for failure to erect cattle guards. There was evidence that the rental value of the lot was reduced from four to three dollars per month by the failure to erect such guards. It was in evidence that the ordinances of the town forbade live stock from running at large therein. The defendant asked the court to charge that in view of such ordi-

nance the defendant was not required to erect cattle guards at the entrance to and exit from the plaintiff's lot. The court refused to so charge and the exception to such refusal is the sole point presented, for the defendant does not resist that part of the verdict which assessed $15 for damages to the fence, but appeals from the assessment of $26 damage from failure to put in the cattle guards.

The Revisal, section 2601, reads as follows: "Every incorporated company owning, operating or constructing, or which shall hereafter own, operate or construct, or any company which shall be hereafter incorporated and shall own, operate or construct any railroad passing through and over the land of any person now enclosed or which may hereafter become enclosed, shall at its own expense construct and constantly maintain in good and safe condition good and sufficient cattle guards at the point of entrance upon and exit from said enclosed lands, and they shall also make and keep in constant repair crossings to any plantation road thereupon. Every such corporation which shall fail to erect and constantly maintain such cattle guards and crossings shall be guilty of a misdemeanor and fined in the discretion of the court, and further liable in action for damages to the party aggrieved."

The defendant contends that this statute does not apply to a lot in town nor to stock law territory, but there is nothing in the statute that discriminates between town and country, nor between stock law and non-stock law territory, and the courts are not empowered to write any discrimination into the statute. The adoption of the stock law does not abrogate in such locality a general statute or rule of law. *Roberts v. Railroad,* 88 N. C., 562. The fact that stock are not allowed to run at large in Edenton made it all the more imperative that the defendant should put up cattle guards where its track passed through the fences of plaintiff's pasture, else stock could not be confined therein and the pasture would become worthless for such purpose.

The defendant contends that it will be a burden if railroad companies are compelled to put up cattle guards wherever they cross the line of every small lot in town. Few lot owners will demand that this be done and if it should prove an unjust burden there is a ready remedy by application to the Legislature to amend the statute. Here if the plaintiff's two acre pasture were in the country it would not be contended the defendant should not put in cattle guards. We fail to perceive any reason why the plaintiff's pasture shall be destroyed with impunity by failure to put in cattle guards to keep in his cows and horses merely because the pasture lies inside the town limits.

The deed to the right of way gives the defendant no more rights than he would have acquired by condemnation. *Hodges v. Tel. Co.*, 133 N. C., 233.

No Error.

BUGGY CO. v. DUKES.

(Filed February 27, 1906).

Negotiable Notes—Open Accounts—Suspension of Right of Action—Consignment Contract—Conversion—Charge.

1. The acceptance of a negotiable security for an open account suspends the right of action until the maturity of the note and then if the plaintiff will resort to his original cause of action, he must surrender the security. The acceptance of the promissory note, unless expressly so agreed upon, will not discharge the original cause of action.

2. In an action for the unlawful conversion of the proceeds of certain buggies alleged to have been received under a contract of consignment, where the complaint sets out the entire transaction and defendant makes no point of the fact that his promissory notes given for the price of the buggies, are not tendered at the trial, but simply denies that he received the buggies upon the contract, and the jury have found the issue against him, his contention that plaintiff cannot retain his notes and at the same time prosecute an action against him for the amount received by him as agent, is without merit.

3. Where His Honor, after the jury retired, learned that he had been misled as to the form of the defendant's allegel contract, his conduct in calling them back and removing any impression made on their mind by reason of such misapprehension was not prejudicial to the defendant.

ACTION by Corbett Buggy Co. against H. T. Dukes, heard by *Judge R. B. Peebles* and a jury, at the October Term, 1905, of the Superior Court of HERTFORD.

On September 28, 1901, defendant entered into a contract with plaintiff corporation, in writing, the terms of which were "It is agreed that all goods shipped on this contract and also all other goods hereafter shipped to the maker of this contract are consigned and the said goods and proceeds of sales of goods received under this contract, whether in cash, notes, book accounts or other proceeds, are to be held in trust and subject to the order of the Corbett Buggy Company. No agreement, verbal or otherwise, is binding on the Corbett Buggy Company, unless embodied in this contract." At the time of the execution of the contract, three buggies were delivered to defendant which were paid for. Afterwards plaintiff alleges other buggies were delivered to him upon and pursuant to the terms of the contract, for the price of which he executed his notes. Plaintiff alleged that defendant had disposed of the buggies so delivered, and received therefor the sum of $521.97, which he had converted to his own use. Defendant admitted the delivery of the buggies, but denied that they were delivered or received under or upon the terms of the contract. That after the first three buggies were shipped, a new verbal contract was made and that thereafter all buggies were delivered pursuant to such new contract, unaccompanied by any trust or fiduciary relation, etc. That the notes were executed for the purchase price of said buggies. He tendered to plaintiff judgment for the amount due on the notes. The jury, upon an issue submitted, upon the controverted allegation, found that defendant received the buggies,

for the price of which the notes were given, on consignment under the terms of the contract to account to plaintiff for the proceeds of the buggies. His Honor rendered judgment for amount found to be due, and directed execution against the person of defendant, etc. Defendant excepted and appealed.

J. R. Mitchell and *F. D. Winston* for the plaintiff.
Winborne & Lawrence for the defendant.

CONNOR, J., after stating the facts: Two exceptions to His Honor's ruling were argued in this court. Defendant contends that conceding the fact to be as found by the jury, the acceptance by plaintiff, of the promissory notes for the price of the buggies, merged the original cause of action or, at least, suspended it until the notes are returned or tendered at the trial; that plaintiff cannot retain his promissory, negotiable notes and, at the same time, prosecute an action against him for the recovery of the amount received by him as his agent. This exception was raised by a request to charge the jury. The issue did not involve the controverted proposition; it was directed simply to the question of fact respecting the capacity in which, or the contract under which, the buggies were delivered and received. The question is, however, presented upon the admitted facts considered in connection with the verdict. It is true, as contended by defendant, that the acceptance of a negotiable security for an open account, suspends the right of action until the maturity of the note and then if the plaintiff will resort to his original cause of action, he must surrender the security. The acceptance of the promissory note, unless expressly so agreed upon, will not discharge the original cause of action. The law is well stated in Clark on Contracts, 435, (2nd Ed.) "In such a case the position of the parties is that the payee, having certain rights against the other party, under a contract, has agreed to take the instrument from him instead of immediate payment of what is due him, or immediate enforcement of

his right of action, and the other party, in giving the instrument, has thus far satisfied the payee's claim, but, if the instrument is not paid at maturity, the consideration of the payer's promise fails and his original rights are restored to him. The effect of receiving a negotiable instrument conditionally, is merely to suspend the right to sue on the original contract until the instrument matures, and when it matures, and is not paid, to give the right to sue either on it or on the original contract." Norton, Bills and Notes (3rd Ed.), 20; *Gordon v. Price,* 32 N. C., 385. The complaint sets out the entire transaction and defendant makes no point of the fact that his promissory notes are not tendered. He simply denies that he received the buggies upon the contract—the jury have found the issue against him. In summing up the arguments of counsel for plaintiff, the court told the jury that plaintiff insisted that defendant's statement—that he had another and different contract from the one introduced by plaintiff—was unreasonable, for the reason that he had come to trial without such contract, and without serving notice on plaintiff to produce it, etc. After the jury retired, plaintiff's counsel called the attention of the court to the fact that in his answer defendant had said that the new contract was in parol. The court caused the jury to be brought back and told them that he withdrew so much of the charge as related to the failure of defendant to produce the written contract or to serve notice on plaintiff to produce it, and that the same should have no influence whatever on their verdict. No exception was taken to this at the time, or until the case on appeal was made out. Waiving the objection that no exception was made at the time, we are unable to perceive how the defendant could have been prejudiced by His Honor's action. He had been misled as to the form of defendant's alleged contract and simply removed an impression made on the mind of the jury by reason of such misapprehension. There is no merit in the exception. The judgment must be

Affirmed.

MITCHELL v. GARRETT.

(Filed February 27, 1906).

Ejectment—Title—Hertford County Act—Presumptions.

1. Chapter 773, Acts 1905, by doing away with the necessity of proving that title to land in Hertford County is out of the State does not go further and provide that the title should be presumed to be in any person who may bring suit and exhibit a perfect chain of deeds without any proof of title, but the claimant must also show by proof sufficient in law for that purpose, that he has in some way acquired the title.

2. The plaintiff's contention that under the Act of 1905, chapter 773, his title was superior to that of the defendant because his deeds were older in date, is not sound.

ACTION by Geo. H. Mitchell and others against J. R. Garrett and others, heard by *Judge R. B. Peebles* and a jury, at the Fall Term, 1905, of the Superior Court of HERTFORD.

Plaintiffs brought the action to recover possession of a tract of land and damages for cutting timber therefrom. They claimed to have established title under the provisions of a recent act of the General Assembly, entitled "An Act to facilitate and cheapen the trial of actions involving the title to or interest in real estate," being chapter 773 of the Public Laws of 1905. The chain of title of each of the parties was set out in the pleadings. The plaintiffs' is as follows: 1. Deed from Elisha A. Chamblee to John Stallings, dated May 25, 1835. 2. Deed from John Stallings to Charles Northcott, dated November 30, 1836. 3. Deed from Charles Northcott to John A. Anderson. 4. Deed from John A. Anderson to Luke McGlaughon, dated March 12, 1844. 5. The will of Luke McGlaughon, dated April 10, 1858, and proof that the plaintiff, G. H. Mitchell, married Martha McGlaughon, daughter of Luke McGlaughon and after her death, the other daughter of Luke McGlaughon, Nancy Vann, widow of Jesse Vann, and that the other plain-

tiffs are the children of said daughters, the latter being dead. Plaintiffs claim under the said will and by descent from their mothers, except G. H. Mitchell, who claims as tenant by the curtesy. Plaintiffs introduced in evidence the deed from John A. Anderson to Luke McGlaughon, which recites the other deeds of prior date and refers to them as deeds conveying the same tract of land, but did not introduce any of the other deeds. They then offered to prove by G. H. Mitchell that the deed from John Stallings to Charles Northcott was lost, except the lower part of it, which the witness had in his possession, and further that he had seen the deed before it was mutilated and destroyed and that it had been duly registered sometime before this action was brought and that the records of Hertford County were burned in 1862. This evidence was offered to show that said deed conveyed the land in dispute. The court excluded the evidence and the plaintiffs excepted. There was evidence on the part of the plaintiffs tending to show that the land, which is known as the "Stallings Tract," has fixed and definite boundaries which consisted of marked trees around the tract, and that this is the same land described in the complaint. There was no evidence of adverse possession in plaintiffs, or those under whom they claimed, for seven years. The defendants introduced the deeds constituting their chain of title and evidence which, as they claimed, tended to show title in them, but it is not necessary to set it forth. Defendants moved to nonsuit the plaintiffs at the close of their testimony, which motion was refused. At the close of all the testimony, they moved again to nonsuit the plaintiffs. The motion was granted and the action dismissed. Plaintiffs excepted and appealed.

Winborne & Lawrence for the plaintiffs.

Pruden & Pruden and *Shepherd & Shepherd* for the defendants.

WALKER, J., after stating the case: The mode of proving title to land in this State has become so thoroughly settled by the decisions of the court that it is hardly necessary to enter again upon a discussion of the subject or to do more than refer to the most recent cases in which the different methods have been stated. *Campbell v. Everhart,* 139 N. C., 503; *Mobley v. Griffin,* 104 N. C., 112. It is clear that plaintiffs have not established any title whatsoever to the *locus in quo* by any of the ordinary ways known to the law. Their counsel have admitted in the first sentence of their brief, that they have not shown any adverse possession of the land sufficient to ripen any color of title they may have had into a good and perfect title, and they must therefore fail in this action, upon their own showing, unless by virtue of the provisions of the Act of 1905, chap. 773, they can succeed. We do not think that act, upon the facts as they now appear, can possibly bear any construction which will aid the plaintiffs or create in their favor a *prima facie* case which would put the defendants to proof in their defense. The meaning of the act is palpable. It does not profess to confer title on any one who may be able to produce a succession of deeds which are not connected with the original title of the State, or are not shown by proof of adverse possession or an estoppel or in some other way to vest a good title in him. It was intended merely to dispense with proof of the fact that the State had parted with its title, because of the difficulty of showing a grant since the destruction of the county records, and any person asserting title to land in that county is still required to otherwise prove it in the same manner as it must be established in a cause pending in a court of any other county where no such statute is in force, and where it has either been shown or admitted that title is out of the State. In other words, the statute, by doing away with the necessity of proving that the title is out of the State, does not go further and provide that the title shall be presumed to be in any person who may bring suit and exhibit

a perfect chain of deeds without any other proof of title, but the claimant must also show by proof, sufficient in law for that purpose, that he has in some way acquired the title. That this is obviously the meaning of the act, will appear by the most cursory examination of its provisions. Each party to the action is required by section 2, to set out his chain of title and it is provided that, when this is done, "the party proving the superior title shall be entitled to recover in the action." It will be observed that the act, in express terms, requires that the plaintiff, in order to prevail in the action, must "prove" or establish a title superior to that of defendant, for the burden of the issue, being upon him, he cannot rely upon the weakness of his adversary's title. The language of the act which we have just quoted does not change in the least the general rule in the law of ejectment, that the plaintiff must fail unless he shows a title good against the world, or good against the defendant by estoppel. By the provisions of the act, each of the parties is given precisely the same advantage he would have had if the act had not been passed, and he had been able to show title out of the State by introducing a grant to some third party or by showing such adverse possession as would raise a presumption that the title was out of the State. In trials involving title to land in Hertford County, title is presumed to be out of the State, but not to be in either of the parties to the suit or in any person from whom he deraigns his title. It is still open to either of them to show a grant from the State, if it can be done, to any person under whom he claims and with whose title, thus derived, he can connect himself by *mesne* conveyances, or he can show open, notorious, continuous and adverse possession for twenty years without color or for seven years with color, or he may establish title in any other way allowed by law. That this is the construction of the act is rendered absolutely certain by the language of section 3, in which it is provided that adverse possession, such as will ripen title, may still be shown by

either party in order to establish his title, either by proving that the person under whom he claims had acquired title by such a possession and then connecting himself with the title so acquired, or by proving such a possession in himself for the required time. But however this may be, the act in explicit terms requires that the plaintiff must show a title superior to that of the defendant before he can succeed in the action, and this he did not do. If we assume that neither party introduced any evidence of title, the plaintiff being the actor and the one who carries the burden of the issue, must of course be cast in the suit. Possession, being *prima facie* evidence of ownership, will protect the defendant, unless the plaintiff show a title or right to oust him. 2 Lewis Blk., p. 663, note (7); Tyler on Ejectment, 204; Newell on Ejectment, 433 (13).

We need not pass upon the question of evidence. The general subject is discussed in *Avery v. Stewart,* 134 N. C., 287. If the evidence was competent and had been admitted, it would not have strengthened the plaintiffs' case, as they did not introduce the deed from Northcott to Anderson or in any other way connect themselves with the title alleged to be in Charles Northcott, and if George Stallings had the title, it would have passed by his deed to Charles Northcott, and plaintiffs having failed to show that they had acquired the latter's title, would have proved the title to be not in themselves, but in a third party, namely, Charles Northcott. Besides, whether the evidence was competent, and should have been admitted or not, can make no difference in the result, as plaintiff failed to show any adverse possession for a sufficient length of time under any of the deeds to ripen their title, and they did not attempt to show title from the State by grant and *mesne* conveyances or otherwise to themselves. The only contention made in the case by the plaintiffs' counsel was that under the act their title was superior to that of the defendants because their deeds were older in date. Such a construction

of the act would not, in our opinion, be a sound or safe one. It would present an anomaly in the law and might threaten, if not destroy, vested rights and established titles, which surely could not have been contemplated by the Legislature.

The ruling of His Honor was clearly right and must be sustained.

No Error.

HOOKER v. BRYAN.

(Filed February 27, 1906).

Wills—Vested Interest—"Upon" and "When"—Remainders.

1. Where a testator in item 5 of his will gives his real estate to his nephew upon his becoming 21 and lends the same to his sister until his nephew is 21; and in item 6 he lends to his sister certain personal property in trust for his nephew until he becomes 21, and in item 7 he gives to his nephew said personal property, *held*, that where the nephew died after the death of the testator and before becoming 21, the court correctly adjudged that the heirs at law of said nephew were the owners of the real estate and his personal representatives the owners of the personal property.

2. Where an estate or interest is bequeathed or devised to one upon his becoming 21 years of age, or when he becomes 21, and in the meantime the property is given to a parent, guardian or trustee for the legatee's benefit, in such case the interest will vest at the death of the testator.

3. *Semble:* That in a case like the present, on the death of the remainderman, the previous disposition of the interest terminates, and the heirs at law and next of kin of the remainderman have a right to the immediate enjoyment of the property.

CONTROVERSY without action by Ella B. Hooker and others against Elizabeth Bryan and others, heard by *Judge G. W. Ward,* in the Superior Court of BEAUFORT.

The pertinent facts presented by the record are as follows: Caroline Bonner died, having made her last will and testament disposing of certain real and personal property, and the parties, plaintiff and defendant, are claimants under said will. The rights of the parties depend upon the following items in said will:

"5. I give the residue of my real estate to my beloved nephew, Roscoe Hooker, upon his becoming 21 years of age, and lend the same to my beloved sister, Ella Bonner, until my nephew, Roscoe Hooker, is 21 years old. 6. I lend to my beloved sister, Ella Bonner, the mule and other personal property upon the farm in trust for Roscoe Hooker until he becomes 21 years old. 7. I give to my beloved nephew, Roscoe Hooker, the mule and any other personal property that may be upon the farm."

Roscoe Hooker, the nephew, died after the death of Caroline Bonner and before becoming 21 years of age, and the plaintiffs are the heirs at law and personal representatives of said Roscoe Hooker. The defendants are the heirs at law and personal representatives of Caroline Bonner, the testatrix, including Ella Hooker, who is one of the heirs at law and next of kin of Caroline Bonner, and is also the Ella Bonner mentioned in the items of said will.

On these facts the question submitted was as to the ownership of the real property in item 5 and of the personal property mentioned in items 6 and 7 of the will, and thereupon the court adjudged that the plaintiffs, the heirs at law of Roscoe Hooker, are the owners of the real property in item 5, and the personal representatives of said Hooker are the owners of the personal property in items 6 and 7, from which judgment the defendants excepted and appealed.

W. C. Rodman for the plaintiffs.
Ward & Grimes for the defendants.

HOKE, J., after stating the case: The words "on or upon" when affecting the quality of an estate in reference to the time of its vesting or enjoyment are substantially synonymous with "when." *Adams v. Williams,* 2 Watts & S., 227; *Wormath v. McCormick,* 51 Pa. St., 504. In bequests of personal property these words usually import a condition, and, unless explained or controlled by some expressions or other provisions of the will, they are annexed as conditions precedent to the substance of the gift and render the interest contingent. This has been the doctrine in the English courts since the case of *Hansom v. Graham,* 6 Vesey, 239, and is well established here. *Giles v. Franks,* 17 N. C., 521; *De Vane v. Larkins,* 56 N. C., 377. While several modern text writers of approved excellence and many decisions seem to give these words the same significance, in reference to devises of real and bequests of personal property, the older authorities hold that in respect to realty "when and upon" import usually a condition subsequent determinative of the estate according to the terms of the condition, and that in the meantime the estate would vest. Lewis Blk., 513, note 144; Roper on Legacies, vol. 2, p. 386.

The distinction has no practical bearing on the case before us and it is therefore not desirable to dwell upon it, nor is it necessary to determine if the same now exists, for all of the authorities are agreed that both as to real and personal property "when and upon" may be so explained and controlled by other expressions and provisions of the will, that they do not import a condition at all, but simply refer to the time of enjoyment, and that the interest conferred will vest at the testator's death to be possessed and enjoyed at the time indicated. In 1 Roper on Legacies, 386, the doctrine is thus expressed: "But all these and similar words may be so explained and controlled by the context of the will as not to prevent the legacies from vesting before the happening of the events upon which they are payable. In such instances, the intention of

the testator's will predominates over technical words and expressions, when it is declared and appears from a sound rational construction of the will." And the decisions in this and other jurisdictions support this doctrine. *Guyther v. Taylor,* 38 N. C., 323; *Fuller v. Fuller,* 58 N. C., 223; *Sutton v. West,* 77 N. C., 429.

In pursuance of the principle above stated, the decisions have established that where an estate is bequeathed or devised to one upon his becoming 21 years of age or when he becomes 21, and in the meantime the property is given to a parent, guardian or trustee for the legatee's benefit, in such case the interest will vest at the death of the testator. Roper, *supra,* 387; *Green v. Green,* 86 N. C., 547. "For," says Mr. Roper, "since the whole interest in the fund is given in one way or the other to or for the benefit of the legatee, it could not be the testator's intention to make it contingent whether the legatee should have the absolute interest. That interest is split into two parts. Till one period, it is given to the guardian or trustee, and at the other, it is given to the legatee. The reason why it was not given sooner to the legatee was from regard to his convenience, because under age. Hence, it is apparent that the words were annexed only to the payment and not to the gift." And so, when the property is given beneficially to a stranger, the same result follows. "For," says the same author, p. 392, "in such case the person to whom the absolute property is limited will take an immediate vested interest in the subject, since such bequests are in the nature of remainders, the rule as to which is that the interest of the first and subsequent takers vest together. It is clear that the testator intended to give immediately the capital to the person in remainder, postponing the enjoyment only till the arrival at a particular age." 2 Underhill on Wills, sec. 896; *Fuller v. Fuller* and *Guyther v. Taylor, supra; Perry v. Rhodes,* 6 N. C., 142; *Room v. Phillips,* 24 N. Y., 465. In *Perry v. Rhodes,* it is said: "And it has been held that where

the immediate interest is given either to a stranger or the legatee himself, such a case proves an exception because it explains the reason why the time of payment was postponed and is perfectly consistent with an intention in the testator that the legacy should immediately vest." And in *Guyther v. Taylor,* it is said: "To these considerations is to be added another important one, which is that the testator disposes of the negroes until the period at which they are to be divided, consequently the whole subject, the *corpus,* is given away for different purposes, so that the interests given to the children are in the nature of remainders, and the term thus, though generally a word of condition, makes in this case only the commencement of the remainder."

Applying these principles to the case at bar, they are decisive in favor of the ruling of the lower court.

As to the personal property, the entire intervening interest is given to a trustee for Roscoe Hooker until he becomes 21 years of age, and then to him absolutely; and to the real estate, the intervening interest is given to Ella Bonner until, etc.

Transposing the words in item 5 of the will the reading of the same would be, "I lend my real estate to Ella Bonner until my nephew, Roscoe Bonner, is 21 years of age, and upon his becoming 21 years of age the property is devised to him," and constitutes a vested remainder.

In Words and Phrases, Judicially Defined, vol. 8, p. 7493, the principle is stated as follows: "When used as a devise of a remainder limited upon a particular estate and terminable on an event which may necessarily happen, 'when' will be construed to relate merely to the time of enjoyment of the estate and not to the time of vesting"—citing numerous authorities.

The facts stated in the case agreed do not disclose whether the period has arrived when Roscoe Hooker would have attained the age of 21, had he lived; but the authorities seem

to hold that in a case like the present, on the death of the remainderman, the previous disposition of the interest terminates, and the heirs at law and next of kin of the remainderman have a right to the immediate enjoyment of the property. 1 Fearne on Remainders, 244; *Mansfield v. Duggard,* 1 Eq. Abridged Cases 195, cited with approval in *Johnson v. Baker,* 7 N. C., 318. There is no error and the judgment of the court below is affirmed.

Affirmed.

BROWN, J., did not sit on the hearing of this appeal.

SIMMONS v. DAVENPORT.

(Filed February 27, 1906).

Attorney and Client—Contracts—Compensation—Specific Instructions.

1. Where the jury found that the plaintiffs were employed by the defendant as attorneys to represent him and take care of his interest, and that they rendered services to him under the contract, they were entitled to recover what their services were reasonably worth, there being no stipulation as to the amount the plaintiffs were to receive; and it makes no difference whether the issue "Did defendant knowingly accept the benefit of such services?" was answered or not.

2. If a party desires fuller or more specific instructions than those given in the general charge, he must ask for them and not wait until the verdict has gone against him and then, for the first time, complain of the charge.

ACTION by F. M. Simmons and others against B. B. Davenport, heard by *Judge Jas. L. Webb* and a jury, at the May Term, 1905, of the Superior Court of CRAVEN.

SIMMONS *v.* DAVENPORT.

Plaintiffs sued the defendant to recover an amount alleged to be due for professional services rendered by them at his request in collecting a debt held by him against an insolvent bank. Defendant denied that he was indebted to the plaintiffs. There was evidence tending to show that plaintiffs had rendered the services at the request of the defendant, and that the latter had received the benefit of them and had refused to pay what they were reasonably worth, and there was some evidence, on the part of defendant, tending to show that while the plaintiffs were the attorneys of the other creditors of the bank, they had not been retained by the defendant. There was also evidence that defendant had frequently consulted with one of the plaintiffs about the collection of his claim, going to his office for that purpose, where defendant was seen in consultation with him. A clerk of the plaintiffs copied a release which defendant was to give to Mr. Blades, trustee of the bank, and about which he had received advice from the plaintiffs. There was much other evidence to sustain the plaintiffs' contention that they had been employed by defendant and rendered the services with the undertsanding that they should be compensated for them. In the view we take of this case, it is not necessary to set out the evidence more in detail. The following are the issues with the answers thereto:

1. "Did the defendant employ Simmons & Ward as attorneys in the matter in dispute? Yes."

2. "Did plaintiffs render for defendant the services alleged to have been performed? Yes."

3. "Did defendant knowingly accept the benefit of such services? Yes."

4. "What was the value of plaintiffs' services? Seventy-five dollars."

The only exceptions taken were to the charge. The court instructed the jury in substance that the burden upon all the issues was upon the plaintiff and that they must satisfy the

jury by a preponderance of the evidence as to them. The court then referred to each issue separately and repeated the instruction as to the first and also as to the second issue which it had given as to all of the issues, and stated further that, if the plaintiff had satisfied them by the greater weight of the evidence, the defendant had employed the plaintiffs to represent him and consulted with them, they should answer the first issue "yes," but if they were not so satisfied, they should answer it "No," and the same was said, with the necessary changes, as to the second issue. The court merely read the third issue to the jury without making any separate comment thereon or giving any instruction in regard to it, other than that contained in the general charge upon all the issues. Upon the fourth issue the court charged that it was for the jury to say how much, if anything, the plaintiffs are entitled to recover and whether the amount stated by the witnesses was a reasonable compensation for the services rendered. That the jury must consider the evidence upon this question and say what amount the plaintiffs should receive for their services. The defendant excepted to the instructions upon the first, second, third and fourth issues. There was a judgment upon the verdict and defendant appealed.

O. H. Guion and *E. M. Green* for the plaintiffs.
W. D. McIver for the defendant.

WALKER, J., after stating the case: We do not see upon what ground the defendant can complain of the instructions of the court. If the plaintiffs were employed by the defendant as attorneys to represent him and take care of his interests, and they rendered services to him under the contract, they were entitled to recover what their services were reasonably worth, there being no stipulation as to the amount the plaintiffs were to receive, and it can make no difference, in this view of the case, whether the third issue was answered

or not, there being enough left, if that issue had not been answered, to support the judgment. *Sprinkle v. Wellborn,* 140 N. C., 163. But we think the jury must have understood the court to charge as to the third issue that the burden was on the plaintiffs to satisfy them by the greater weight of the evidence that the defendant had accepted the benefit of plaintiffs' services. Besides, there was no serious controversy as to the fact that the defendant had been benefited by what plaintiffs had done. As to the first and second issues, the charge was correct as to the burden of proof and sufficient in other respects to inform the jury as to the quantum of proof required of the plaintiffs to establish the affirmative of those issues, and it was also correct as to the fourth issue. The evidence was so simple that the jury could hardly have been misled by the charge as to the true inquiry involved in each issue. The defendant did not ask for any special instructions, nor did he request the court to amplify its instructions or to present the case in any particular manner to the jury or to charge as to any principle of law he may have thought should be considered by the court and explained. In the absence of any such request, we cannot say that it was reversible error for the court to have charged in the general terms employed by it, especially in a case like this one, which involves so little complication that a jury could not well have misunderstood the legal aspect of the matter. If a party desires fuller or more specific instructions, he must ask for them and not wait until the verdict has gone against him and then, for the first time, complain of the charge. *Kendrick v. Dellinger,* 117 N. C., 491; *McKinnon v. Morrison,* 104 N. C., 354; *State v. Debnam,* 98 N. C., 712; Clark's Code (3 Ed.), pp. 535 and 536.

The decision in *State v. Boyle,* 104 N. C., 800, upon which the defendant's counsel relied, has no application to the point now being discussed, namely, that the charge was too general. In *State v. Boyle,* there was a prayer for special instructions.

The case was fully explained and the erroneous impression in regard to it corrected in *State v. Pritchett,* 106 N. C., 667; *State v. Brady,* 107 N. C., 822; *McCracken v. Smathers,* 119 N. C., 620, and especially in *Boon v. Murphy,* 108 N. C., 187. In subsequent decisions it has been treated as overruled. *State v. Beard,* 124 N. C., 813; *State v. Edwards,* 126 N. C., 1051; *State v. Kinsauls,* 126 N. C., 1095; *Turrentine v. Wellington,* 136 N. C., 312. Whatever may be its real status, it has been so frequently disapproved, and so much has been said against it, that it may now be considered no longer of any value as a precedent. The rule which requires that the complaining party should ask for specific instructions if he desires the case to be presented to the jury by the court in any particular view, does not of course dispense with the requirement of the statute that the judge shall state in a plain and correct manner the material portions of the evidence given in the case and explain the law arising thereon. Revisal, section 535; *State v. Kale,* 124 N. C., 816. But a party cannot ordinarily avail himself of any failure to charge in a particular way, and certainly not of the omission to give any special instruction, unless he has called the attention of the court to the matter by a proper prayer for instructions. So if a party would have the evidence recapitulated or any phase of the case arising thereon, presented in the charge, a special instruction should be requested. *Boon v. Murphy,* 108 N. C., 187. In the last cited case the court held, citing *State v. Lipsey,* 14 N. C., 486, and *State v. Haney,* 19 N. C., 390, that "the judge is not bound to recapitulate all the evidence to the jury; it is sufficient for him to direct their attention to the principal questions which they have to investigate and to explain the law applicable to the case, and this particularly when he is not called upon by counsel to give a more full charge." In *Boon v. Murphy* the respective duties of the judge and counsel under the Act of 1796 (Revisal, section 535,) are clearly and fully defined and it is now commended

as a safe guide in practice. That case and *State v. Pritchett*, 106 N. C., 667, and *McCracken v. Smathers*, 119 N. C., 620, seem to be directly in point in this case and to dispose of the defendant's objection to the general terms in which he alleges the charge of the court was couched. There was no error in the trial of the case.

No Error.

PATTERSON v. STEAMSHIP CO.

(Filed February 27, 1906).

Steamship Companies—Carriers—Failure to Supply Berths —Damages.

1. Where the plaintiff testified that he purchased his ticket and was first to apply at the purser's office for a berth, but was refused, though others who applied after him were supplied, and was compelled to sit up all night; that he applied to the defendant for a berth when he bought his ticket, but the defendant refused to supply berths until after the ship had left the dock, *held*, that it was error to nonsuit the plaintiff.

2. A common carrier must serve the public without discrimination and sell its tickets and accommodations in the order of application, and it is liable for an action of damages for a wrongful refusal, and, in addition, for the indignity, vexation and disgrace, if there is any evidence of such.

ACTION by Joseph F. Patterson against Old Dominion Steamship Co., heard by *Judge Henry R. Bryan* and a jury, at the November Term, 1905, of the Superior Court of CRAVEN.

D. L. Ward and *W. D. McIver* for the plaintiff.

No counsel for the defendant.

CLARK, C. J. The plaintiff's evidence is that he purchased his ticket and with three friends was first to apply at the purser's office for berths, and requested a state room for the four, containing four berths. Two of his friends were given berths in this room, together with two strangers who applied after the plaintiff. The plaintiff and one of his friends were refused a state-room and berth altogether, and they were compelled to sit up all night. The defendant was applied to by the plaintiff for a berth when he bought his ticket, but the defendant refused to supply state-rooms or berths until after the ship had left the dock and was in mid-stream.

If, as is presumably the case on a steamer running at night, a berth is a reasonable and proper accommodation, the defendant is liable for failure to furnish it, unless the fact that none can be had is made known to the passenger who chooses to ask for a berth when he buys his ticket. The defendant should have had its office for berths open when it sold its tickets. It was its duty to sell tickets to applicants in the order in which they were applied for, without discrimination, till the full number was sold to the passengers whom it could carry comfortably, and the same is true as to the sale of its berths. If its berth and state-room accommodations are exhausted when a ticket is asked for, the intending passenger on learning that fact may defer his trip till another time, or may go by another route rather than sit up all night. It is an imposition upon the travelling public to withhold information as to the lack of a sufficient number of berths till after the passage ticket is paid for, and the passenger has embarked and the vessel is in midstream, so that he cannot help himself. Still worse, if possible, is the refusal then to furnish berths in the order in which they are applied for. A common carrier must serve the public without discrimination and sell its tickets and accommodations in the order of application. 6 Cyc., 535. It is liable for an action of damages for a wrongful refusal, and, in addition, for the indig-

nity, vexation and disgrace if there is any evidence of such. *Railroad v. Renard,* 46 Ind., 293; *State v. Railroad,* 48 N. J. L., 55; *Wallen v. McHenry,* 3 Hump., 244.

Nothing is here said that would militate against the *bona fide* engagement of tickets and berths beforehand, nor against the refusal to sell a ticket or berth to any person who, for a good reason, may be objectionable to the other passengers, but the passenger, if not thus objectionable, should be informed that no berths can be had—all being already sold—when he purchases his ticket, if he then asks for a berth. And if he does not then apply, when applications for berths are made at the purser's window, in regular course after the vessel starts, the berths not already sold or engaged must be disposel of in the order of application. If this were not so, berths could be furnished to the friends of the purser or for a private consideration to him (a tip), as is here testified was the case, to the exclusion of those prior in time, who did not pay the purser, as well as the regular fare. If the supply of berths is exhausted before an applicant is reached, it will be his own fault that he did not apply for his berth and learn whether or not one could be had at the time he bought his ticket.

The plaintiff here testified that he made no objection to the ladies on board being first supplied with berths, but to other men being furnished who applied for berths after he did, one of whom "tipped" the purser.

The answer sets up defenses which we cannot consider as no evidence was offered in their support. Upon the evidence offered, the granting a nonsuit was

Error.

HARRELL v. BLYTHE.

(Filed February 27, 1906).

Judicial Sales—Confirmation—Inadequate Price—Power of the Court.

1. Where the judge found, upon abundant evidence, that the sum bid at a sale of land for assets by an executor, was inadequate, there was no error in refusing to confirm the sale.

2. Judicial sales are only conditional and are not complete until they have been reported to and confirmed by the court; and the bid may be rejected and the sale set aside, if, in the exercise of its sound discretion, the court should think proper to do so.

MOTION in the cause of A. J. Harrell, Executor of Jas. McDaniel, against George Blythe and others, heard by *Judge R. B. Peebles,* at the August Term, 1905, of the Superior Court of NORTHAMPTON.

This proceeding was brought in the late county court by A. J. Harrell, as executor of James McDaniel, for a sale of his land for assets. Harrell has since died and J. A. Worrell, who has qualified as administrator *de bonis non* with the will annexed of James McDaniel, has been substituted as plaintiff in his stead, and other interested persons have been made parties by the service of process. The county court ordered a sale of the land; the plaintiff Harrell sold the same and made a report of the sale to the court. James Bolton, who was the purchaser of the land at the sale, assigned his bid to Godwin M. Powell; and Cornelius Futrell, who claims an interest in the land under him by *mesne* conveyances, moved before the clerk of the court to confirm the sale. The clerk refused to grant the motion and he appealed to the Superior Court. Judge Peebles found as a fact that the land was sold for $125, which was less than one-third of its value, as it was worth at the time of the sale at least $450. He

found other facts which it is not necessary to state in the view we take of the case. Upon his findings of fact, he affirmed the judgment of the clerk and refused to confirm the sale, whereupon Cornelius Futrell excepted and appealed.

Winborne & Lawrence and *Mason & Worrell* for the plaintiff.

Gay & Midyette and *Peebles & Harris* for the defendant.

WALKER, J., after stating the case: If we concede that this court has the jurisdiction to review the judge's findings of fact, which are alleged to be against the weight of the evidence, we would not disturb them, as we think there was abundant evidence in the case to sustain the court's conclusion as to the inadequacy of the sum bid for the land. The only question, therefore, which we will consider, is whether, upon the fact thus found, the court ruled correctly in refusing to confirm the sale.

Where land is sold under a decree of court, the purchaser acquires no independent right. He is regarded as a mere preferred proposer until confirmation, which is the judicial sanction or the acceptance of the court, and until it is obtained, the bargain is not complete. *Miller v. Feezor*, 82 N. C., 192; *Attorney-General v. Navigation Co.*, 86 N. C., 408; *Pritchard v. Askew*, 80 N. C., 86; *Ex Parte Bost*, 56 N. C., 482; *In re Yates*, 59 N. C., 306. It was said by this court in *Wood v. Parker*, 63 N. C., 379, following substantially what had been decided in *Ex Parte Bost*, *supra*, that a court certainly has the power to set aside a sale made in pursuance of its authority, either for the relief of the owner of the property, if the price is inadequate, or for the relief of the purchaser, if from mistake or fraud he has been induced to bid too much for the same. In the exercise of its large discretion, it will administer justice and equity to all persons interested. Sales of this character are only conditional and are not complete until

they have been reported to, and confirmed by the court. The bidder cannot complain of this rule, for he makes his offer to buy with the understanding that the whole matter is entirely under the control of the court and that his bid may be rejected and the sale set aside if, in the exercise of its sound discretion, the court should think proper to do so. In a case of a sale under order of court by an administrator, this court said in *Mason v. Osgood,* 64 N. C., 467, that an administrator's authority is limited where he sells the land of the intestate under a license obtained from the court. He is a mere agent of the court to execute a naked power, and a purchaser acquires no right to the land until the sale is confirmed and title made under an order of the court granting the power of sale. The subject is fully discussed in *Joyner v. Futrell,* 136 N. C., 301. Rorer, in his work on Judicial Sales, sections 122 and 124, says that while the court will have a proper regard to the interest of the parties and the stability of judicial sales, it has a broad discretion in the approval or disapproval of a sale made under its decree; and, in section 126, he further says that the court is clothed with an unlimited discretion to confirm a sale or not, as may seem wise and just. Confirmation is consent, and, the court being the vendor, it may consent or not in its discretion. Whether there be a limit to this discretion or not, it is not necessary for us now to determine, as it is apparent from the authorities cited that the court had the power and the right to refuse to confirm in this case. *In Pritchard v. Askew, supra,* this court, by *Dillard, J.,* said: "In sales of the character of the one under consideration, the bidder is never considered a purchaser until the sale is reported and confirmed. He is to be taken as becoming the best bidder, subject to the understanding in all cases that the court may confirm the sale or set it aside and order a re-sale, as in the exercise of a sound discretion it may determine to be right and proper." In *Ex Parte Bost, supra,* it was held that if the court is informed by a master's report

or by affidavits that the sum bid for land is not its full value, it will be its duty to set aside the report and order a re-sale. *Vass v. Arrington,* 89 N. C., 10. So that the judge not only had the power, as we have already shown, but it also seems that it was in a certain sense his duty to act as he did. We do not see how he could have decided otherwise under the circumstances.

The finding of fact as to the inadequacy of the price being sufficient of itself to support the ruling of the court, it is not necessary to inquire whether the other facts found by the judge were either singly or collectively sufficient for that purpose or whether he committed any error in respect to them.

The motion in this cause was made because the court suggested in *Joyner v. Futrell, supra,* that it was the proper, if not the only remedy. But upon an investigation of the facts in this proceeding, the merits are found to be against the petitioner, Cornelius Futrell, and he must therefore fail to secure any relief. There was no error in the decision of the court below.

No Error.

ATKINSON v. RICKS.

(Filed February 27, 1906).

Executors and Administrators—Sale of Land by Commissioners—Motion in the Cause—Judgment—Attachment.

The land of a decedent, against whose executor a judgment has been obtained, cannot be sold through a commissioner by an order in the cause, even though the land may be subject to the lien of an attachment levied upon it during the decedent's life time.

MOTION in the cause heard by *Judge R. B. Peebles,* at Halifax, N. C., on August 24, 1905, in the action by W. J.

Atkinson, Executor of Willis W. Barham, against W. S. Ricks, Executor of J. J. Boyd, pending in the Superior Court of NORTHAMPTON.

The plaintiff sued J. J. Boyd, testator of the defendant, before a justice of the peace to recover a debt of $65 and interest, and caused an attachment to be issued and levied on a tract of land belonging to him. He afterwards recovered judgment. The defendant appealed to the Superior Court, where a judgment was rendered against his executor, he having died in the meantime. In that judgment it is provided that the land attached be condemned to the payment of the judgment in the action, which is declared to be a lien on the same. On August 11, 1905, the plaintiff moved before the judge, then holding the Superior Court of Northampton County, for an order to the defendant to show cause why a commissioner should not be appointed in the said action to sell the land described in the judgment, and which had been attached, to satisfy the said judgment. The order was issued and on the return day the judge found as facts that the defendant is insolvent and is not a fit person to sell the land, and he thereupon made an order appointing the two persons named therein commissioners to sell the land for the purpose of satisfying the judgment, and report to the court. The defendant excepted and appealed.

Peebles & Harris and *Winborne & Lawrence* for the plaintiff.

Mason & Worrell, F. R. Harris and *S. J. Calvert* for the defendant.

WALKER, J., after stating the case: The counsel devoted much of the argument to alleged irregularities in the proceedings, such, among other defects, as want of sufficient notice and the hearing of the motion in Halifax instead of Northampton County. We do not deem it necessary to notice the

questions thus raised, as there is one objection that goes to the root of the matter, and is fatal to the plaintiff's right to have relief of any kind in this form of proceeding. When a creditor has a claim against a decedent's estate, whether by judgment or otherwise, the law is explicit in its directions as to how payment may be enforced. If the personal representative has failed to file his inventory or his accounts, as required by the statute, he can be compelled to do so upon application to the clerk of the Superior Court. Revisal (1905), sections 43, 100 and 103. If he improperly refuses to apply the personal assets to the payment of the debts due by the decedent, or if there are no such assets, and he fails to apply for an order to sell the land for the payment of debts, ample provision is made for proceedings at the instance of any creditor, who considers himself aggrieved by his misconduct, to compel him to account and apply the personal assets in his hands to the payment of debts. If there are no personal assets, the creditors may have an order for the sale of the land. Sec. 104 to 132. The remedies thus afforded to the creditor are adequate for the full protection and enforcement of all his rights, and they should be pursued, if he would seek to have satisfaction of any claim he holds which the personal representative of his debtor, having assets, wilfully refuses to pay. The executor or administrator, where good cause is shown, may be removed from office, and there are perhaps other effective remedies provided by law not necessary to be mentioned, which in a proper case may also be used by the creditor in ultimately securing payment of any claim held by him. But we know of no law authorizing the proceeding by which the defendant was temporarily ousted from his office as executor and commissioners appointed in his stead to sell his testator's land, or conferring jurisdiction upon a judge of the Superior Court to entertain such a proceeding. The land of a decedent, against whose executor a judgment has been obtained, cannot be sold through a commisisoner by an order in

the cause, even though the land may be subject to the lien of an attachment levied upon it during the decedent's lifetime. We must think that such a proceeding is entirely without precedent or warrant in law to sustain it, as the learned counsel who argued for the plaintiff was unable, even with all his accustomed zeal and diligence in the preparation of his cases, to refer us to a single authority in its support, and we have not been able ourselves, after a most careful search, to find one. If J. J. Boyd, the original defendant, was now alive, the payment of the judgment could be enforced by the sale of the land under an execution issued to the sheriff. Revisal, sec. 784; *May v. Getty,* 140 N. C., 310. The plaintiff can now proceed against the executor under the statute we have cited, and, in the application of the assets to the payment of the claims of creditors, any lien he may have acquired by the levy of the attachment will be preserved to him. Revisal, sections 87 and 767.

But the proceeding in the court below cannot be sustained. To uphold it, would not only violate the spirit, but contravene the express provisions of the statute, and produce confusion and uncertainty in the administration of the estates of deceased persons. It might also result in giving one creditor an advantage over the others to which he is not entitled under the law. The intention of the Legislature is that the assets of a decedent shall be administered, as far as may be done, in one proceeding, under proper safeguards, for the benefit of all the creditors, and we must effectuate this intention when it does not conflict with any other special provision of the law in favor of a particular creditor, who has legitimately secured priority. We take it to be clear, therefore, that a creditor who has procured judgment upon his demand against the personal representative of his debtor cannot proceed by motion in the same cause to have the land sold, either by the representative or a commissioner, for the purpose of paying the judgment, unless the suit was also brought to

enforce a lien acquired by mortgage or some other kind of security. But the lien of an attachment levied in the life time of the debtor cannot, as we have said, be enforced in that way.

There was error in granting the plaintiff's motion. The proceeding should be dismissed.

Error.

CHERRY v. CANAL CO.

(Filed February 27, 1906).

Trespass — Remainderman — Parties — Harmless Error — Statute of Limitations—Permanent Damages.

1. Where there has been a trespass committed on real property, causing permanent damage which impairs the value of the inheritance, the owner of the remainder or the reversion can maintain an action for the wrong done to his estate and interest.

2. The defendant having entered a general denial, any defect of parties which may have existed is waived; and if permanent damage is shown impairing the value of the inheritance, the plaintiff, as owner of two thirds of the reversion after the life estate, has a right of action for the full amount of damage done to his two-thirds interest in the property.

3. Where it is clear that the plaintiff's cause of action is barred by the statute of limitations, which is properly pleaded, an error as to permanent damage, if any was committed, is harmless and the judgment of nonsuit will not be disturbed.

4. In an action brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where it appeared that the entire wrong was done in 1898 and 1899, the action was barred under Rev., sec. 395, sub-sec. 3.

5. Rev., sec. 394 (chapter 224, Laws 1895), which establishes the period of limitation as to permanent damages at five years, applies only to actions against railroad companies.

CHERRY *v.* CANAL CO.

ACTION by W. A. Cherry against Lake Drummond Canal & Water Co., heard by *Judge T. J. Shaw* and a jury, at the September Term, 1905, of the Superior Court of CAMDEN.

Plaintiff, owning two-thirds of the reversionary interest in fee, after the life of Mrs. Kate Cherry, in the house and lot abutting on the canal of defendant, brought this action, alleging that defendant, in widening and deepening its canal, in the years 1898 and 1899, had wrongfully and negligently thrown sand and dirt upon and around the said house and lot, causing great and permanent damages to the same. Neither the life tenant, Mrs. Kate Cherry, nor the owner of the other third of the reversion were parties, and the action was brought to recover permanent damage to plaintiff's interest in the property.

Defendant denied that it had wronged or injured plaintiff or his interest and pleaded the statute of limitations in bar of plaintiff's demand.

There was evidence of plaintiff tending to show that in the years 1898 and 1899 the defendant company, a corporation for constructing and operating a canal in North Carolina and Virginia, had widened and deepened its canal and in so doing had thrown sand and mud on the plaintiff's premises and so embanked it upon and around the house, situated thereon, that when it rained the said house was virtually in a mud hole, and by reason of said wrong and injury the premises had become almost valueless, the house being unrentable and uninhabitable, and the damage thereto was from $1,200 to $1,500; that the alleged wrong was done by the defendant in 1898 and 1899. There was evidence of the defendant tending to show that the damage was not so great in amount as the plaintiff claimed, and also to the effect that the embankment of sand and mud which caused the injury could be removed.

On the pleadings there were four issues framed for submission to the jury as follows: 1. Is the plaintiff the owner

of the land described as alleged? 2. Did the defendant wrongfully and unlawfully injure the plaintiff's land as alleged? 3. If so, what permanent damage to the land has the plaintiff sustained? 4. Is the plaintiff's cause of action barred by the statute of limitations?

At the close of the testimony the court intimated that it would charge the jury that, upon all the evidence, if believed, they should answer the first issue "yes, two undivided thirds subject to the life estate;" the second issue "yes," and the third issue "nothing." The plaintiff excepted and upon this intimation submitted to a nonsuit and appealed.

Aydlett & Ehringhaus for the plaintiff.

Pruden & Pruden and *Shepherd & Shepherd* for the defendant.

HOKE, J., after stating the case: It has been settled by several decisions of this court that the facts disclosed in the foregoing testimony amount to an actionable wrong on the part of the defendant company towards the owner of the injured property. *Mullen v. Canal Co.*, 130 N. C., 496; *Pinnix v. Canal Co.*, 132 N. C., 124. And the same authorities declare that when the damage is of a permanent character, recovery may be had in one action for the entire wrong. *Mullen v. Canal Co., supra*, at page 505. It is also an established principle that where there has been a trespass committed on real property, causing permanent damage which impairs the value of the inheritance, the owner of the remainder or the reversion can maintain an action for the wrong done to his estate and interest. He could not maintain the technical action of trespass, because, as said in *Latham v. Lumber Co.*, 139 N. C., 9, he has neither the possession nor the right thereto; but he could maintain an action of trespass on the case if the wrong was done by a stranger, and of waste or action in the nature of waste if

done by the owner of a particular estate. 28 Am. & Eng. Enc. (2 Ed.), 575 and 622; *Burnett v. Thompson,* 51 N. C., 210.

Ordinarily, when the remainder or reversion is held by co-owners, the alleged wrongdoer might by demurrer require that all persons so interested should be joined. But in this case, the defendant having entered a general denial, any defect of parties which may have existed is waived; and if permanent damage is shown impairing the value of the inheritance, the plaintiff, as owner of two-thirds of the reversion after the life estate of Mrs. Kate Cherry, has a right of action for the full amount of damage done to his two-thirds interest in the property. *Burnett v. Thompson, supra; Putney v. Lapham,* 64 Mass., 232; *Thompson v. Hoskins,* 11 Mass., 419. The action then is well brought so far as the parties in interest are concerned.

The court is also inclined to the opinion that the judge below committed an error in the charge proposed by him on the third issue—that addressed to the question of permanent damage. There seems to have been evidence to be considered by the jury tending to show permanent damage. This intimation of His Honor was very likely an inadvertence, and intended by him for the fourth issue—that as to the statute of limitations.

Very certain it is, however, that the judgment of nonsuit should not be disturbed; for though it should be established and declared by a verdict that permanent damage has been done to the plaintiff's estate and interest, it is perfectly clear, both from the allegations of the plaintiff and the uncontroverted facts, that the plaintiff's cause of action is barred by the three-year statute of limitations. The statute being properly pleaded, the error as to permanent damage, if any was committed to the plaintiff's prejudice, was harmless and no good would result by awarding a new trial.

In 2 Am. & Eng. Enc. Pl. & Pr., 499, we find it stated that

"appellate courts deal with judicial acts and it would not avail to reverse a ruling or judgment correct on the record, though it may be founded on an erroneous reason." And again, in the same volume, at page 500: "This system of appeals is founded on public policy and appellate courts will not encourage litigation by reversing judgments for technical, formal or other objections which the record shows could not have prejudiced the appellant's rights." The decided cases in this and other jurisdictions support this position. In *Butts v. Screws,* 95 N. C., 215, *Ashe, J.,* for the court, says: "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." See also *Ratliff v. Huntly,* 27 N. C., 545; *Fry v. Bank,* 75 Ala., 473. The opinion also finds support in the case of *Shackleford v. Staton,* 117 N. C., 73, where, on motion, a cause was dismissed when, the statute being properly pleaded, the facts stated in the complaint showed that the cause of action was barred by the statute of limitations.

According to the allegations of the complaint and the uncontroverted facts, the entire wrong was done in the years 1898 and 1899. The action was instituted on August 24, 1903. The statute of limitations which applied (Revisal, sec. 395, sub-sec. 3,) declares that an action of this character is barred in three years. The plaintiff therefore can in no event recover and any error on the third issue was harmless.

It is urged that chapter 224, Public Laws 1895, established a period of five years as the limitation, and that in *Mullen v. Canal Co.,* 130 N. C., 505, the court applied this statute to actions like the present; but this is a misconception of the opinion referred to. This statute (chap. 224, Laws 1895,) brought forward in the Revisal of 1905 as section 394, which establishes the period of limitation at five years, in express terms applies only to actions against railroad companies, and the courts have no authority to ex-

tend its provisions to actions of a different character. The language of the learned judge who wrote the opinion in *Mullen's case, supra,* is as follows: "While chapter 224, Laws 1895, applies only to railroads, yet as the court has extended the rule of permanent damages to water companies and telegraphs, under the principle laid down in *Ridley v. Railroad,* 118 N. C., 996, we see no reason why it should not apply equally to canals." It will thus be observed that the court here only declared that it would extend the rule of permanent damages to actions against the defendant company according to the principles announced and exploited in *Ridley's case* and as contemplated by the statute in reference to railroads, but did not, and did not intend, to extend the application of the statute or the period of limitation therein established to cases not contained in its provisions. There is no reversible error presented and the judgment of nonsuit is

Affirmed.

CRADDOCK v. BARNES.

(Filed February 27, 1906).

Docketing Appeal—Motion to Dismiss.

1. Where a case was tried below in the fall and docketed in this court three days before the district was called at the opening of the spring term, a motion on the first day of the spring term to dismiss the appeal because not docketed seven days before the call of the district as required by rule 5, will be denied.

2. The ruling, that though an appeal is not docketed seven days before the call of the district to which it belongs, as required by rule 5, it will not be dismissed (when docketed at the next term here after the trial below) if it is docketed before the motion is made to dismiss, applies to the first as well as the other districts, as the appellee can file his motion to dismiss with the clerk whether the court is in session or not.

CRADDOCK *v.* BARNES.

ACTION by H. D. Craddock against Priscilla Barnes and others, heard at the Fall Term, 1905, of the Superior Court of WASHINGTON. This was a motion of the defendants, appellees, to dismiss the appeal because not docketed as required by Rule 5 of the Supreme Court.

Aydlett & Ehringhaus for the plaintiff.
W. M. Bond and *H. S. Ward,* for the defendant.

Per Curiam: This case, from the First District, was tried below last fall and was docketed here three days before the district was called at the opening of this term. The appellee moved on the first day of this term to dismiss the appeal because not docketed seven days before the call of the district as required by Rule 5. We have held that though the appeal is not docketed seven days before the call of the district to which it belongs, it will not be dismissed (when docketed at the next term here after the trial below) if it is docketed before the motion is made to dismiss. *Curtis v. Railroad,* 137 N. C., 308; *Benedict v. Jones,* 131 N. C., 474, and other cases there cited. The appellee contends that these decisions ought not to apply to the First District because if they do an appellant from that district can always obtain six months delay by docketing later than seven days before the call of the district, and thus the case will not stand for hearing at this term, and yet the appellee cannot move to docket and dismiss if the appeal is docketed before court meets for this term, since court not being in session till the day the call of the First District begins, the appellee will have no opportunity to move to dismiss till after the appeal is docketed.

There would be great force in this suggestion but for the fact that if the appeal is not docketed seven days before the call of the district to which it belongs the appellee can file his motion to dismiss with the clerk whether the court is in session or not. He need not file it in open court. This is

true of any district. When the call of the district begins the motion should then be called to our attention if not before, and if it antedates the docketing of an appeal which was not docketed seven days before the call of the district, the motion to dismiss must be allowed. Here the appeal was not docketed seven days before the call of the district. The appellee, instead of filing his motion then with the clerk, did not file it till the first day of this term, when the call of that district began and after the appeal had been docketed. His motion to dismiss comes too late.

Motion Denied.

CROCKER v. MOORE.

(Filed February 27, 1906).

Road Law—Dispensaries—Application of Proceeds—Power of Legislature—Constitutional Law—Taxes for Roads—Levy Without Popular Vote—Necessary Expenses.

1. The Act of 1903, chap. 538, which establishes a road system and appropriates to the road fund one-half the net proceeds of all dispensaries "now established or hereafter established" in Northampton County, applies to the dispensary established at Jackson under the Act of 1899, chap. 189, providing that one-third of the net proceeds shall go to the town and two-thirds to the public schools of the township.

2. As one-half of the proceeds is subtracted by the Act of 1903 to be applied to the roads, the other half only remains to be applied in the ratio stated by the Act of 1899.

3. The power of the General Assembly over dispensaries in their creation, abolition and the application of their net proceeds is plenary.

4. The provisions in the Act of 1903 appropriating to the road fund one-half of the net proceeds of the dispensary is valid and the money should be paid to the road fund, even though other parts of the act were unconstitutional.

5. The objection that the Act of 1903 takes the power of levying taxes for road purposes out of the hands of the county commissioners is without merit. The act provides merely that the board of road commissioners shall ascertain and decide as to the amount needed for working the road and the rate necessary to raise that sum, and report to the board of county commissioners, who shall levy the taxes.

6. The fact that the road commissioners, under Act of 1903, chap. 538, may report an amount, which, added to the other necessary taxes, will exceed the constitutional limitation, does not render the statute invalid.

7. The objection to the constitutionality of the Act of 1903, chap. 538, in that the act applies a part of the county capitation tax to the use of the public roads in violation of the Constitution, Article V, section 2, which appropriates the State and County poll tax "to the purposes of education and the support of the poor," cannot be sustained, as that provision applies to the levy of taxation for general, not special, purposes.

8. Working the roads is a necessary expense and the act authorizing the county commissioners to levy a tax for such purpose without a vote of the people is valid under Art. VII, section 7, of the Constitution.

9. Under section 14 of Article VII of the Constitution, the General Assembly is given power to modify, change or abrogate all the provisions of Article VII, except sections 7, 9 and 13.

ACTION by J. G. L. Crocker, Treasurer of Northampton County, against W. P. Moore, Treasurer of the Town of Jackson, heard upon an agreed statement of facts by *Judge B. F. Long*, at the Fall Term, 1905, of the Superior Court of NORTHAMPTON. From a judgment for the plaintiff, the defendant appealed.

Gay & Midyette and *W. E. Daniel* for the plaintiff.

Peebles & Harris and *Winborne & Lawrence* for the defendant.

CLARK, C. J. Chapter 538, Laws 1903, which establishes

a system for working roads in Northampton County, in section 7 thereof, provides that one-half of the net proceeds of all dispensaries "now established or hereafter established" in that county shall go to the road fund. Under chapter 189, Laws 1899, a dispensary had been established at Jackson in said county, section 16 whereof provided that one-third of the net proceeds thereof should be applied to the uses of said town and the other two-thirds for the benefit of the public schools of that township. The dispensary was established by virtue of the police power of the State which had the right to appropriate the net proceeds to any purpose the Legislature thought best for the public welfare. The method of appropriation provided by the Act of 1899 was not a vested right in the beneficiaries therein named and the method could be changed at will by any subsequent Legislature.

It is true the Act of 1903 does not refer by name to the Act of 1899, but it specifically appropriates one-half the net proceeds of all dispensaries "now established" or hereafter to be established in Northampton County. This certainly applies to the dispensary at Jackson, and the power of the General Assembly over dispensaries in their creation, abolition and the application of their net proceeds is plenary. The dispensary is not a contract, but a privilege conferred on the town of Jackson, and like the charter of the town itself the act creating the dispensary may be changed at the will of the Legislature.

As one-half of the net proceeds is thus subtracted to be applied to the roads, the other half only remains to be applied in the ratio stated by the Act of 1899, i. e., one-third of said remaining one-half will go to the town and two-thirds of said remaining one-half to the public schools of the township.

It is, however, further contended that chapter 538, Laws 1903, is unconstitutional as to certain other provisions, and hence the attempted appropriation of one-half of the net

proceeds of the dispensary thereunder falls with it. But the above part of the statute is valid and the money from the dispensary should be paid to the road commissioners, even though other parts of the act were unconstitutional. However, we cannot sustain the objections made to the constitutionality of the act.

1. The first objection raised is that it takes the power of levying taxes for road purposes out of the hands of the county commissioners. The act provides merely that the board of road commissioners shall ascertain and decide as to the amount needed for working the road and the rate necessary to raise that sum and report to the board of county commissioners who shall levy the taxes.

2. The second objection is that the rate of taxation, when swelled by the taxes for road purposes, will exceed the constitutional limitation. If the amount reported as needed by the road commissioners, added to the other necessary taxes, shall exceed the limitation upon taxation, there could be a reduction agreed upon, if necessary, by the two boards, or the county commissioners may not levy the excess, but that the road commissioners may possibly report an excessive sum, does not render the statute invalid. It does not appear that in fact any levy has been made in excess of the constitutional limitation. An injunction against such excess would not invalidate, but would make more necessary, the payment of money from the dispensary for road purposes. The language of the act authorizing the levy of a special tax for these roads is almost identical with that sustained in *Herring v. Dixon,* 122 N. C., 420, and *Tate v. Commissioners, ibid.,* 812. The Legislature can authorize a county to exceed the constitutional limitation for necessary purposes, and working the roads is a necessary purpose.

3. In that the act applies a part of the county capitation tax to the use of the public roads in violation of the Constitution, Article V, section 2, which appropriates the State

and county poll tax "to the purposes of education and the support of the poor." But that provision applies to the levy of taxation for general not special purposes. *Board of Education v. Commissioners,* 137 N. C., 310.

4. That the act violates the Constitution, Article VII, section 7, by authorizing the county commissioners to levy taxes in Northampton County, for other than necessary purposes, without a vote of the people. But working the roads is a "necessary expense." *Tate v. Commisioners,* 122 N. C., 812; *Herring v. Dixon, ibid.,* 420; *Satterthwaite v. Commissioners,* 76 N. C., 153; *Brodnax v. Groom,* 64 N. C., 249.

5. For that the act attempts to direct the board of county commissioners in their supervision and control of roads and bridges in violation of the Constitution, Article VII, section 2. But under section 14 of Article VII, inserted by the convention of 1875, the General Assembly is given full power to modify change or abrogate all the provisions of Article VII, except sections 7, 9 and 13. We find

No Error.

KING v. RAILROAD.

(Filed February 27, 1906).

Contract of Employment—Rules of Employer.

1. The following telegram sent by defendant's general road master to plaintiff "Can offer you extra force at $65 per month. Will want you at once to ditch D. &. N. Road and R. & G. Answer quick. Job will last all the year," constituted an offer of employment for the remainder of the year, which became binding upon acceptance.

2. The above special contract of employment was not affected by the rules of defendant company, known to plaintiff, that its servants are employed by the month subject to be discharged at its will.

KING *v.* RAILROAD.

ACTION by J. W. King against Seaboard Air Line Railway, heard by *Judge E. B. Jones* and a jury, at the March Term, 1905, of the Superior Court of HALIFAX.

This was an action to recover damages for breach of contract of hiring. The following issues were submitted to the jury without objection, and answered as follows: 1. Was the contract of employment for the balance of the year? Yes. 2. Was the contract of employment for an indefinite period leaving to the parties the right to sever their connection at will? No. 3. Is defendant indebted to plaintiff, if so, in what amount? $440, with interest from January, 1904, to date, March 14, 1905. The plaintiff's action is founded on the following telegram sent by J. T. Elmore, general road master of the defendant: "Henderson, N. C., April 2, 1903. J. W. King: Can offer you extra force at $65 per month. Will want you at once to ditch D. & N. Road and R. & G. Answer quick. Job will last all the year. J. T. Elmore."

There was evidence tending to prove that the plaintiff accepted the offer at once; that he was placed in charge of the work and at the end of eleven days discharged. From the judgment rendered, the defendant appealed.

Claude Kitchin, E. L. Travis and *W. E. Daniel* for the plaintiff.

Day, Bell & Dunn and *Murray Allen* for the defendant.

BROWN, J. There are a large number of exceptions presented in the record, but since the defendant deems only one worthy of notice, in the brief, we deem it unnecessary to discuss the others, although we have carefully considered them and find them to be without merit. The defendant contends that, first, the telegram to King did not constitute an offer of employment that would become binding upon acceptance; second, it was not an offer of employment for a definite time; and third, if it was a binding offer, the court should have

read into it the rules of defendant company that employees are engaged to work by the month, subject to discharge at will.

The argument of counsel that by using the potential "can offer," Elmore did not make a positive offer of employment, but only intended to open negotiations, is entirely destroyed by the undisputed evidence that the plaintiff accepted the offer by wire, reported for duty, and was placed in charge of the work and prosecuted it for eleven days until discharged. The reasons for his discharge are given in the answer, as well as Elmore's letter to the plaintiff of April 23, 1903. There is evidence for the defendant tending to prove a different contract after the plaintiff reported for duty, but that evidence seems to have been discredited by the finding of the jury. The question was submitted to them to determine the duration of the employment and they have said it was for the remainder of the year, the burden being properly placed on the plaintiff to prove it.

A general or indefinite hiring is *prima facie* a hiring at will, and if the servant seek to make it out a yearly hiring, the burden is upon him to establish it by proof. Wood, Master & Servant (2 Ed.), sec. 136. In his charge upon this issue, His Honor instructed the jury that the language of the telegram indicated a contract for the remainder of the year, and that if they should find it was accepted by the plaintiff and no other agreement was afterwards substituted for it, they should answer the first issue "Yes." We are unable to place any other construction upon the written words of the telegram unless it be that the contract was to ditch the D. & N. Road, and that the employment was to last until that job was completed. That construction would not help the defendant, as there is no evidence that the work was completed before the expiration of the year. Counsel for the defendant rely upon *Edwards v. Railroad,* 121 N. C., 490, to sustain their construction of the words of the telegram, as indi-

cating a clear intent to hire by the month. We are unable to see that the case supports their contention. The letter, in the latter case, advised Edwards of his appointment as general store keeper—"your salary will be $1,800 a year." Edwards accepted and at once, about July 10, 1894, entered upon the performance of his duties, and was paid $150 per month until he was discharged January 1, 1896. The court held that the contract was not specific as to the *term* of service; that there was nothing on its face to justify the construction that the employment was for a year, and that the sum mentioned was merely the measure of compensation, leaving the parties to sever their relations at will.

In the case before us, the compensation and term of service are both plainly indicated, the one to be paid monthly, the other to endure for the current year. The language is sufficiently clear to justify a prudent man in so interpreting it before accepting the offer. *Mining Co. v. Harris,* 24 Mich., 115. It is contended that according to the rules of the defendant its servants are employed by the month, subject to be discharged at its will, and that the plaintiff knew this. There is abundant evidence tending to prove the existence of such a general rule in relation to the hiring of its regular employees. But this transaction does not appear on its face to be the ordinary taking of a servant into the regular service of the company and placing him upon its pay roll. It appears to be more in the nature of a special contract to supervise a certain piece of work until completed, accompanied by a statement as to how long the service will be required. The plaintiff had been section master and knew of the general rule and custom of the defendant, but he also testified that he had known the company before to make yearly contracts of hire.

Prima facie, Elmore had the right to make the contract with the plaintiff and there is nothing in the evidence to rebut it. No rule book is in evidence containing any rule denying

such authority to a general road master. Elmore's jurisdiction was extensive, extending from Portsmouth to Raleigh, and over the D. & N. and other branch roads, so that he seems to be "one in authority" among the defendant's employees. There is evidence upon the part of the defendant which, if believed, fully justified the discharge of the plaintiff. All of it was contradicted by him. The contentions of both parties upon this feature of the case were fully presented by the judge below to the jury under the third issue. We find no vice in the instructions.

Upon review of the entire record the judgment must be Affirmed.

LUMBER CO. v. LUMBER CO.

(Filed February 27, 1906).

Trespass—Damages—Former Judgment—Estoppel.

1. In an action for damages for trespass committed in cutting timber, where the plaintiff relied alone on constructive possession arising out of its paper title which it alleged covered the land upon which the cutting was done, and where the jury found that the defendant had not trespassed and therefore that the plaintiff had no title to the *locus in quo*, this finding of the jury and the judgment of the court in accordance therewith are a complete bar to a motion in the action by plaintiff for the assessment of damages claimed by him to have accrued from a continuance of the same alleged trespass since the action was commenced, and this is true, though the plaintiff recovered nominal damages by reason of an agreement of counsel admitting a technical trespass.

2. A judicial determination of the issues in one action is a bar to a subsequent one between the same parties having substantially the same object in view, although the form of the latter and the precise relief sought is different from the former.

3. While the act of entering upon land and cutting timber constitutes a continuing trespass for which successive actions may be brought, the plaintiff recovering damages in each to the date of his writ, yet this principle does not apply, so as to prevent a bar, where the plaintiff has failed to prove the unlawful entry or to show his possession, either actual or constructive, of the land upon which he alleges the defendant trespassed.

MOTION in the cause of John L. Roper Lumber Co. against Elizabeth City Lumber Co., heard by *Judge T. J. Shaw,* at the Fall Term, 1905, of the Superior Court of CAMDEN.

This cause was before us, on appeal by both parties, at February Term, 1904 (135 N. C., 742 and 744), and again, on petition to rehear, at February Term, 1905 (137 N. C., 431). We held in the first of the above reported cases that the plaintiff was not entitled to judgment declaring it to be the owner of the land, as the recovery of the land was not the object contemplated when the suit was brought and was not within its intended scope, but only the recovery of damages for a trespass in cutting and removing timber. A simple judgment dismissing the action was directed to be entered for the defendant. Plaintiff filed a petition to rehear the case and we then held that there was error in the former judgment and that plaintiff was entitled, upon the agreement of counsel and the verdict of the jury, to nominal damages and costs. The judge, on plaintiff's motion, had enjoined the defendant from cutting timber on the land in dispute unless it should give bond to pay all damages the plaintiff sustained by reason of the modification of the order for the injunction. The bond was given and the defendant was thereupon permitted to continue the cutting of timber on the land. When the case was again called in the lower court, the plaintiff's counsel moved that judgment be entered for nominal damages and costs, according to the mandate of this court, and further that the damages sustained by the cutting of the timber since the suit was brought be inquired into and assessed by a jury or ascertained by a reference as was proper, and that it have judgment for the amount so ascertained. This motion was denied and plaintiff excepted and the case is again brought here by appeal of the plaintiff from the order denying its motion. The facts are so fully stated in the former reports of the case that it is unnecessary to reproduce them here.

W. M. Bond and *W. B. Rodman* for the plaintiff.
Aydlett & Ehringhaus for the defendant.

WALKER, J., after stating the facts: The motion of the plaintiff, as stated in the argument before us, is based upon the contention that the former judgment for nominal damages and costs does not preclude a recovery of damages accrued since the action commenced, as in an action of trespass, such as this is, damages can only be assessed to the date of issuing the writ or summons and not to the time of the trial, and therefore no inquiry was made in the former trial as to any damage sustained since the action commenced. He relies on the case of *Jones v. Kramer,* 133 N. C., 446, in support of this position. We do not think that decision has any application to the facts of this case. Counsel, as it appears, agreed, before the trial in the court below, that if the jury should answer the first issue, as to title, "Yes," the fact that defendant had trespassed should be taken as admitted and the amount of the damages should be ascertained by a reference under The Code. The jury did give affirmative answers to both the first and second issues, which related to the title, or ownership of the land, but *Judge Justice,* who presided at the trial, submitted a third issue, as follows: "Has the defendant cut timber or committed other acts of trespass on the lands described in the complaint and inside the Weeks and Valentine grants?" To this issue the jury responded in the negative. In referring to this phase of the case, this court, by *Douglas, J.,* in 135 N. C., at page 743, said: "The plaintiff brought a civil action in the nature of trespass, alleging its ownership of the land in question and the defendant's trespass thereon. The jury found in substance that the plaintiff owned a part of the lands described in the complaint, but that the defendant had not trespassed upon those particular lands. This was the practical result of the verdict," and the learned justice, for the court, then

added, "and its legal effect was to entitle the defendant to a judgment that it go without day and recover its costs." On the rehearing we practically affirmed what was first said by the court, as to the legal effect of the answer to the third issue, but we held that the other part of the decision, which we have just quoted, did not give proper force and effect to the agreement of counsel, and the general result was declared to be that plaintiff was entitled to recover nominal damages, under the agreement and the finding of the jury upon the first and second issues, but that it was not entitled to any substantial damages, as it was perfectly apparent, from the judge's charge and the response to the third issue, the jury had found that plaintiff had failed to show that its paper title covered the *locus in quo* or that any actual trespass had been committed by cutting timber or otherwise. As said by *Justice Douglas* for this court (135 N. C., 743), the gravamen of the action is trespass. Plaintiff does not sue to recover the land, but for an injury to his possession. It has not shown it was in actual possession of the *locus in quo* claiming the same as its own, nor is there any pretense that it ever had any such possession to be invaded, so far as the case shows. It relied upon constructive possession arising out of its alleged title, and counsel so stated at the last hearing, as they had previously done. The jury have found that while plaintiff has title to the land described in the complaint, because the grant (referred to therein) and *mesne* conveyances introduced by it at the trial corresponded with the description set out in the complaint, yet the jury have gone further and said that these papers do not describe the land upon which the timber was cut and upon which the trespass is alleged to have been committed. There has been no assessment of damages nor attempt to assess them and no issue submitted for their assessment. The jury have merely found that there has been no trespass and there must be a trespass before there can be any assessment of damages. The

plaintiff therefore has lost upon the main issue in the case. Again, it is apparent that the plaintiff sued to recover damages for cutting timber and removing the same from the land it claims to own, that being the sole trespass complained of and that the acts of trespass upon which the suit was originally predicated were of the same nature as those now alleged to have been committed since the suit was commenced. In other words, the timber from the beginning has been cut upon the same land. The plaintiff so alleges in the fourth, fifth and sixth sections of the complaint. The specific allegation in those sections is that defendant had cut (before the suit was commenced) and is now cutting timber on the land and, moreover, will continue to cut timber thereon unless restrained by the court. The defendant admits the cutting of timber, but denies the plaintiff's ownership of the land on which the cutting has been and is being done, and avers ownership in itself. So that the issue was squarely joined between the parties as to the location of the lands described in the plaintiff's grant and deeds. The jury answering the third issue, under instructions not only not assailed but proper in themselves and which strictly confined their consideration of that issue to the question of location, have found that the plaintiff's grant and deeds did not cover the *locus in quo*. We do not see why this finding and the judgment of the court in accordance therewith, is not a complete bar to the prosecution of any further suit or proceeding for the recovery of damages. Plaintiff having relied upon its title as giving it the necessary constructive possession to maintain this action of trespass for cutting the timber it has, so far as the recovery of actual or substantial damages is concerned, been defeated before the jury upon the vital question involved in the case, namely, the location of the lands described in its title deeds and their identification with those upon which the trespass is alleged to have been com-

mitted and, but for the technical advantage gained by the agreement, it would have lost everything.

The test as to the bar of a previous action, is not whether the damages sought to be recovered are different, but whether the cause of action, or the decisive question involved is the same. *Gibbs v. Cruikshanks,* L. R. 8, C. P. 460. A judicial determination of the issues in one action is a bar to a subsequent one between the same parties having substantially the same object in view, although the form of the latter and the precise relief sought is different from the former. *Edwards v. Baker,* 99 N. C., 258; *Tuttle v. Harrill,* 85 N. C., 456. It is true that the act of entering upon land and cutting timber constitutes a continuing trespass for which successive actions may be brought, the plaintiff recovering damages in each to the date of his writ. *Jones v. Kramer,* 133 N. C., 446; *Moore v. Love,* 48 N. C., 215. But this principle does not apply, so as to prevent a bar, where the plaintiff has failed to prove the unlawful entry or to show his possession, either actual or constructive, of the land upon which he alleges the defendant trespassed, and the jury have found and the court adjudged in this case that the plaintiff has no title to the land upon which to base a constructive possession, which was his sole reliance. *Brown v. Lake,* 29 Ohio St., 64. Having joined issue upon this question, so essential to be established in its favor in order to warrant a recovery of damages, and having lost, it will not now be heard to assert what is practically and in legal contemplation the same title and right, but must abide the legal consequences of the verdict and judgment against it. The rule is that a point once determined between the parties or their privies cannot again be brought in question, and the former decision may be relied upon as an estoppel in any cause of action that may thereafter be tried involving the same point. *Gay v. Stancell,* 76 N. C., 369; Bigelow on Estoppel (5 Ed.), p. 10; *Yates v. Yates,* 81 N. C., 397; *Jones v. Beaman,* 117 N. C.,

259. It matters not whether we treat the former adjudication as a bar or as a strict estoppel, *Isler v. Harrison,* 71 N. C., 64, the legal effect is the same, as either is of conclusive force upon the question decided. As said in *McElwee v. Blackwell,* 101 N. C., at p. 195, "the title is determined and this effectually defeats the action." At the former trial, the fundamental and essential fact of the plaintiff's case, upon which it based its claim for damages, was, as we have shown, found against it, and the law forbids further litigation.

We do not construe the defendant's or the inspector's reports of timber cut as do the plaintiff's counsel, but even if the defendant had reported the timber as having been cut on the land described in the complaint, the law will not permit that fact, nor the terms of the orders made in the cause, to outweigh the deliberate verdict of a jury upon that question, followed, as it was, by a judgment of the court thereon. *Fanshaw v. Fanshaw,* 44 N. C., 169; *Yarborough v. Harris,* 14 N. C., 40.

The motion of the plaintiff is for the assessment of damages accrued since the action was commenced, that is, of course, for damages which have accrued in like manner as those which were alleged to have been sustained prior to the date of the summons. To allow this, would be to give the plaintiff two chances to establish its case and to recover, not as much, it is true, as it would have done if it had succeeded instead of failed in showing the justice of its claim, but still something of the same kind and depending upon the same asserted right or title which the jury had found did not in fact exist. We hold that the effect of the former decision is to bar the plaintiff's recovery of damages.

No Error.

ELLIS v. HARRISON.

(Filed March 6, 1906).

Statute of Distribution—Personalty.

Where a fund consists solely of personalty and the claimants at the time of the intestate's death were and are now all in equal degree—the next of kin of the intestate, the statute of distributions (Rev., sec. 132,) requires that the fund shall be distributed per capita.

ACTION by O. L. Mills, Administrator of A. M. Harrison, against W. Harrison and others, heard by *Judge Jas. L. Webb,* at the October Term, 1905, of the Superior Court of FRANKLIN.

This was an action to determine the respective interests of certain claimants to a fund held by the plaintiff as administrator of Alexander Harrison, deceased, for distribution among his next of kin. The facts material to a determination of the questions involved and which are admitted show that Alexander Harrison died intestate on August 2, 1903, having his domicile in the State of North Carolina, leaving personal estate amounting to several thousand dollars. There was dispute between the parties as to whether the intestate died domiciled in Arkansas or North Carolina, and it was admitted that the law of Arkansas required the distribution to be per capita. The demurrer, however, filed by the children of Mrs. Brown, admits the domicile to have been in North Carolina, and this will be taken as true *pro hac vice.* The said Alexander Harrison left him surviving as his next of kin, Willie and Mary Burt Harrison, two children of a brother who had died before the intestate, and Alexander Brown and five other children of a sister who had also died before the intestate. The two children of the deceased brother claimed that the distribution of the estate should be *per stirpes* and the six children of the deceased sister con-

tended that such distribution should be per capita, and this was the single question presented and decided by the court.

The court below gave judgment that the distribution be per capita, and the defendants, William and Mary Burt Harrison, excepted and appealed.

T. W. Bickett and *W. H. Yarborough, Jr.*, for the plaintiff.

W. H. Ruffin for the defendants.

HOKE, J., after stating the case: It will be noted that the fund consists solely of personalty and that the claimants at the time of the intestate's death were and are now all in equal degree—the next of kin of said intestate. In such case our statute of distributions (Revisal, section 132), and the uniform construction put upon it by our court require that the fund shall be distributed per capita. *Skinner v. Wynne,* 55 N. C., 41. Representation in this kind of property, when allowed, is only resorted to when it is necessary to bring the claimants to equality of position as next of kin. It is otherwise as to realty. *Clement v. Cauble,* 55 N. C., 82; *Cromartie v. Kemp,* 66 N. C., 382. The decisions cited in support of the distribution *per stirpes* are all cases involving the division of real estate. The case of *Crump v. Faucett,* 70 N. C., 346, is in apparent conflict with our present decision, but an examination of the record discloses that the subject matter of litigation in that case was real estate, and the opinion throughout shows that the learned judge was construing, and only intended to construe, the statute of descents.

There is no error and the judgment below is

Affirmed.

DAUGHERTY v. TAYLOR.

(Filed March 6, 1906).

Husband and Wife—Declarations—Evidence—Cestui que Trust.

1. An instruction that the jury should not consider any declarations made by the husband of the *feme* plaintiff unless they find that such declarations were authorized by her, is correct, where the husband had neither then nor at the trial any interest in the land in controversy and is only joined because his wife is plaintiff.

2. The contention that the husband's declarations are competent against him as a *cestui que trust*, in possession, is without merit, where neither the plaintiff nor the defendant derive their title from him, nor is he setting up any title to himself.

ACTION by H. P. Daugherty and wife against B. R. Taylor and wife, heard by *Judge Henry R. Bryan* and a jury, at the November Term, 1905, of the Superior Court of CRAVEN. From a judgment for the plaintiffs, the defendants appealed.

D. L. Ward and *Simmons & Ward* for the plaintiff.
W. W. Clark for the defendant.

CLARK, C. J. In 1870 the plaintiff, H. P. Daugherty, bought a tract of land containing 200 acres, built a house upon it and has lived there ever since. In 1878 this tract was sold under execution and was bought by George A. Richardson under an agreement to reconvey to said Daugherty whenever he repaid him. It does not appear whether the money or any part of it has ever been repaid. In 1894 Richardson conveyed about 160 acres of this land to Elizabeth Daugherty, wife of H. P. Daugherty. Two years later Richardson executed a deed of gift of the remaining 40 acres to his daughter, the defendant, Beulah Taylor. The controversy is as to the location of the "mouth of Lot's Branch," a material call in both of said deeds.

The sole exception is to this instruction given at the request of plaintiff: "The jury should not consider any declaration made by H. P. Daugherty after the deed from the sheriff to Richardson, unless they further find that such declarations were authorized by Elizabeth Daugherty." In this there was no error. H. P. Daugherty had then and had at the trial no interest in the land, and is only joined because his wife is plaintiff in the action, his declarations, unauthorized by her, cannot be evidence against her. It is true that there is evidence that H. P. Daugherty made such declarations (denied by him on the trial) in 1893, after a deed had been executed by said Richardson and H. P. Daugherty and his wife for the timber on such tract and before the land was conveyed to Daugherty's wife by Richardson, and the defendant contends that his declaration was competent against him as a *cestui que trust,* in possession. But neither the plaintiff, Betty Daugherty, nor the defendant, Beulah Taylor, derive their title under H. P. Daugherty, nor is he setting up any title to himself in this action. His declarations are not competent against his wife unless he was acting by her authority, and indeed at that time she had no title herself. If H. P. Daugherty held under a parol agreement from Richardson to reconvey upon repayment of the purchase money, there is no evidence that the money had been repaid, and his wife does not hold under any title derived from him nor is she in privity with such title.

No Error.

McAFEE v. GREGG.

(Filed March 6, 1906).

Justices of the Peace—Jurisdiction—Judgments Against Married Women—Defect of Parties.

1. Judgments rendered by a justice of the peace, entitled "McAfee Estate by Cora McAfee, Agent, against W. A. Gregg and wife, Addie," and docketed in the Superior Court, are not void either because of the alleged defect as to parties plaintiff or because it appears in the summons that the defendant Addie was then married, and it was error to dismiss supplemental proceedings brought to enforce their payment.

2. To render the judgment of the justice of the peace void, it must appear on the record, not only that the defendant is at that time a married woman, but it must also appear on the face of the proceedings, in that court, that the cause of action as to her is one over which that court has no jurisdiction.

Action by McAfee Estate by Cora McAfee, Agent, against W. A. Greeg and wife, Addie Gregg, heard by *Judge Fred Moore,* at the Fall Term, 1905, of the Superior Court of Buncombe. From an order dismissing supplemental proceedings and dissolving injunction order, the plaintiff appealed.

Julius C. Martin for the plaintiff.
Merrimon & Merrimon for the defendant.

Brown, J. The supplemental proceedings were instituted to enforce the payment of two judgments rendered by a justice of the peace, entitled as above, and docketed upon the judgment docket of the Superior Court of Buncombe County.

1. The judgments are not void because of the alleged defect as to parties plaintiff. Such objection, if taken properly at the time of the trial before the justice, would have been

good. The apparent irregularity in the title does not avoid the judgments rendered. *Leak v. Covington,* 99 N. C., 559; *Hicks v. Beam,* 112 N. C., 642. Cora McAfee is plaintiff of record. The other words may be rejected as surplusage.

2. The judgments are not void, because it appears in the summons that at the time they were filled out the defendant Addie was then married. It is not true that the justice's court has no jurisdiction in any case of a married woman. She may be sued in that court for a debt due by her, or on a contract made by her, before marriage, or for a debt contracted by her after marriage as a free trader. *Neville v. Pope,* 95 N. C., 346. If the *feme* defendant desired to interpose her coverture as a bar to the prosecution of the suits, she should have entered her pleas. *Vick v. Pope,* 81 N. C., 22. It does not appear upon the records of the justice's proceedings but that the causes of action were such that a *feme covert* could properly have been sued on them in that court. On the contrary, for aught that appears, the debts may have been contracted by the *feme* defendant before marriage or as a free trader after marriage. There is nothing appearing in the record to the contrary.

To render the judgment of the justice of the peace void, it must appear on the record not only that the defendant is at the time a married woman, but it must also appear on the face of the proceedings in that court, that the cause of action as to her is one over which that court has no jurisdiction.

His Honor erred in holding the judgments void and in dismissing the proceedings and dissolving the injunction. The cause is remanded to be proceeded with before the clerk or judge according to law.

Reversed.

PINEUS v. RAILROAD.

(Filed March 6, 1906).

Railroads—Flag Stations—Station Premises—Passengers—Negligence.

1. Where plaintiff arrived at a flag station on defendant's railroad, with his trunks, which were placed with checks on them in defendant's warehouse located on its right of way, and used for storing baggage and before the arrival of the next train, plaintiff went with defendant's clerk to this warehouse to recheck the trunks and after rechecking them started to take the approaching train, having a mileage book, and stepped in a hole in the platform adjoining the warehouse, and was injured, *held*, plaintiff was a passenger when injured and there was sufficient evidence of negligence to be submitted to the jury.

2. The duty of a railroad company in respect to keeping safe station premises extends to all who rightfully come upon the premises on legitimate business to be transacted with its agent, and this duty extends to flag as well as regular stations.

ACTION by H. Pineus against Atlantic Coast Line Railroad Co., heard by *Judge Jas. L. Webb* and a jury, at the November Term, 1905, of the Superior Court of EDGECOMBE.

This was an action to recover damages for injuries sustained on the platform of defendant's warehouse. From a judgment of nonsuit, the plaintiff appealed.

Thorne, Gilliam & Gilliam for the plaintiff.
John L. Bridgers for the defendant.

BROWN, J. The testimony most favorable to plaintiff tends to prove that he arrived at Sharpsburg on defendant's railroad, with his trunks, which were placed with checks on them in defendant's warehouse by direction of Dawes, defendant's agent, and they remained in custody of defendant while plaintiff was at Sharpsburg, which was from one train

to the next southbound train. The warehouse was on defendant's right-of-way and used by defendant for freight purposes. Defendant's agents testified that passengers' baggage was stored and handled in the warehouse on this platform. Plaintiff's baggage had been previously stored there and he had gotten on and off the train there. Shortly before arrival of next train defendant's agent sent his clerk with plaintiff to this warehouse for the purpose of rechecking the trunks to Elm City. After rechecking the trunks plaintiff started to take the approaching train. It was at night; there was no light on the platform and it was encumbered with cotton. Plaintiff stepped into a hole in the platform and was injured. Plaintiff had a mileage book good on defendant's road.

If these facts are true plaintiff was a passenger when injured. He had a right to seek his baggage and recheck it. It matters not whether Sharpsburg was a regular or a flag station, the defendant owed plaintiff the duty to provide a safe platform, especially as plaintiff entered on it at invitation of defendant's agent for a legitimate purpose. *Daniel v. Railroad,* 117 N. C., 592. The duty of a railroad company in respect to keeping safe station premises extends to all who rightfully come upon the premises in pursuance of the invitation which it holds out to the public, and embraces all who come there on legitimate business to be transacted with its agent. Wood on Railways, pp. 310, 1341, 1349; *Beard v. Railroad,* 48 Vt., 101; 6 Cyc., 605, 610. There was, in our opinion, sufficient evidence of negligence to be submitted to the jury under appropriate issues.

It is contended that there is a variance between the allegations of the complaint and the proof. We do not think the alleged variance sufficient to justify a nonsuit. It may be well to amend the complaint, although we do not decide that it is insufficient as it is. The nonsuit is set aside.

New Trial.

HOSIERY CO. v. COTTON MILLS.

(Filed March 6, 1906).

Contracts—Sales—Measure of Damages—Date of Delivery Postponed—Harmless Error.

1. In an action to recover damages for breach of contract in failing to deliver goods having a market value, the general rule for the measure of damages is the difference between the contract price and the market value "at the time when and place where they should have been delivered."

2 Where, by the terms of the contract, the goods are to be delivered by instalments or at stated periods, the time of delivery will be the date for the delivery of each instalment successively, the damage being the aggregate of these differences estimated as of these respective dates, and interest where allowed.

3. This rule generally obtains, though the last period for delivery had not elapsed when the action was brought or the cause tried.

4. Where, however, the date of delivery has been postponed by agreement of the parties or at the request of the bargainor and for his convenience, acquisced in and assented to by the bargainee, in such case, the time of delivery will be at the subsequent date and the damages estimated as of that date.

5. In order to constitute reversible error, it must appear that the appellant's rights have in some way been prejudiced by the action of the court below.

ACTION by Crescent Hosiery Co. against Mobile Cotton Mills, heard by *Judge R. B. Peebles* and a jury, at the August Term, 1905, of the Superior Court of HALIFAX.

There was evidence tending to show that on or about August 1, 1902, defendants contracted to sell and deliver to plaintiff 75,000 pounds of cotton yarns, 25,000 at 14½ cents per pound, and 50,000 at 14¾ cents per pound. That defendant, from time to time thereafter, delivered under the

contract 39,992 pounds, leaving a balance undelivered of 35,087 pounds, for non-delivery of which the present action was instituted. That the contract evidently contemplated that the yarn was to be delivered in weekly shipments, no definite amount being specified for each week, and defendant had commenced shipping at the rate of 1,000 pounds per week, but owing to difficulties in procuring hands and cotton, had been irregular about it, and between the time the contract was entered into and April 16, 1904, had delivered to plaintiff the said amount of 39,992 pounds, which had been received as delivered under the contract; and on that date, defendant wrote to plaintiff and refused to make any further delivery.

The correspondence between the parties during the period covered by the deliveries which were made, shows that at various times, when there were delays and failures in the shipments, defendants would write to plaintiff explaining that these failures, etc., were owing to scarcity of hands, etc., but stating that the drawback would be overcome and expressing the intention to resume shipments and keep right up with plaintiff's orders.

Plaintiff, while requesting shipments of yarn, accepted the various explanations, in one letter expressing sympathy with defendant's difficulties about hands and continuing the contract relations between the parties.

There was evidence to the effect that the market price of these yarns had continuously and steadily increased from the date of the contract till the time when same was broken on April 16, 1904, and on that date the market price at the place of delivery was 22¼ cents and continued at that price during the month of April. There was also evidence to the effect that some time after receiving the letter of April 16, plaintiff had bought, to replace the cotton yarns not delivered, 25,000 pounds of yarn at 22½ cents and later, the remaining 10,078 pounds at 20 cents per pound. This, from

the testimony, seems to have been some months after the termination of the contract. The court charged the jury that if the evidence was believed there was a breach of contract and the damage was the difference between the market and the contract price of the yarn at the date of the termination of the contract by letter, April 16, 1904. Defendant excepted.

There was a verdict in favor of the plaintiff assessing its damage at $2,630.85. The plaintiff having only claimed in its pleading and demanded judgment for $2,000 and the court having declined to permit an amendment to the pleadings enlarging the plaintiff's demand, there was judgment on the verdict for $2,000 and interest, and the defendant excepted and appealed.

Kitchin, Smith & Kitchin, W. E. Daniel and *E. L. Travis* for the plaintiff.

Day, Bell & Dunn and *Murray Allen* for the defendant.

HOKE, J., after stating the case: The exceptions in this appeal which require consideration are addressed to the charge of the court on the issue as to damages.

The defendant contends that this is a contract for delivery of goods in instalments, and that the court below committed an error in fixing April 16, 1904, when the breach of contract was recognized as entire, as the time when the amount of damage should be estimated; whereas he should have fixed upon the successive periods when there was a failure to deliver the weekly instalments as a correct rule, and that on a market which was constantly advancing, the rule adopted worked to his prejudice to the extent of several hundred dollars. The various exceptions of the defendant are addressed to that single question.

It is undoubtedly the general rule that on a failure by the bargainer to deliver goods having a market value, the meas-

ure of damage is the difference between the contract price and the market value "at the time when and place where it should have been delivered." 2 Sedg. Dam., sec. 734; 2 Sutherland on Damages, sec. 651; *Clements v. State,* 77 N. C., 142; *Coal Co. v. Ice Co.,* 134 N. C., 574; *Saxe v. Lumber Co.,* 159 N. Y., 378. And where, by the terms of the contract, the goods are to be delivered by instalments or at stated periods, the time of delivery will be the date for the delivery of each instalment successively, the damage being the aggregate of these differences estimated as of these respective dates, and interest where allowed. *Sutherland, supra,* sec. 651; Wood's Mayne on Damages, sec. 206; *Brown v. Buller,* Law Rep. 7 Exch., 319; *Furnace Co. v. Cochran,* 8 Fed. Rep., 463. And this rule generally obtains, though the last period for delivery had not elapsed when the action was brought or the cause tried. *Roper v. Johnston,* Law Rep. C. P. No. 8, p. 167. Where, however, the date of delivery has been postponed by agreement of the parties or at the request of the bargainer and for his convenience, acquiesced in and assented to by the bargainee, in such case, the time of delivery will be at the subsequent date and the damages estimated as of that date. Sedg., *supra,* sec. 737; Paige on Cont., sec. 1589; *Summers v. Hibbard,* 153 Ill., 102; *Iron & Metal Co. v. Hirsch,* 94 Ill. App., 579; *Hill v. Smith,* 34 Vt., 525; *Trask v. Hamburger,* 70 N. H., 453; *Ogle v. Earl Vane,* Law Rep. Q. B. No. 3, p. 271; *Hickman v. Haines,* Law Rep. C. P. No. 10, p. 595.

In Paige on Contracts, *supra,* it is said: "And if the time of delivery is postponed by mutual consent, the time fixed by the last postponement is the time at which the damages should be estimated." In *Iron & Metal Co. v. Hirsch, supra,* it is said: "The performance by appellant was postponed from time to time by promises to deliver. These promises extended over a period from the time when delivery was due by the terms of the contract until the time of the settlement by the

appellee of the claim from damages against him and the bringing of the suit." And the damages were assessed at a subsequent period. In *Ogle v. Vane, supra,* it was held that "there was evidence from which the jury might infer that the plaintiff's delay was at the defendant's request; that as the evidence went to show, not a new contract, but simply a forbearance by the plaintiff at the defendant's request, the Statute of Frauds did not apply and the plaintiff was entitled to a verdict for the full amount of damages." As will be noted, this was a case involving a question on the statute of frauds, but it is, we think, also an apt authority on the point here presented, that where delivery is postponed by defendant's request and for his convenience, the date of estimating the damages will be fixed at the subsequent date. *Hickman v. Haines, supra,* is to like effect.

We are of opinion that the correct interpretation of the correspondence and conduct of the parties show that there was a request for forbearance on the part of the defendant accompanied by renewed promises to deliver, acquiesced in and assented to by the plaintiff, which resulted in postponing the time for delivery originally agreed upon. Thus, in the letter of June 8, 1903, the defendant writes: "We are due you on your order, after this shipment of May 30, of 53,866 pounds. We have been very short-handed in our mill, and we are away behind on all our orders on that account, but we are making every effort to get more hands, and as soon as we can do that and get out full production, we will then be able to make you more frequent shipments, and we will be glad to do so as soon as it is possible for us to do it." Signed, Mobile Cotton Mills, M. W. Dunlap, Pres. And on July 10, 1903: "We have had a great deal of machinery standing because we did not have the hands to run it, and as you understand, if we cannot get the yarn made, we cannot ship it. However, we will keep right behind your order and make a

special effort to get you off a shipment with as little delay as possible." Signed as above.

And on July 13, 1903: "We will request the railroad company to trace the shipment we made you on June 30, and hope it will reach you promptly. We also make you another shipment on your order as soon as we possibly can. We are still very short-handed in our mill on account of sickness among our hands, and are away behind on all of our orders on that account, and we do not think it is going to be possible for us to ship you 2,000 pounds weekly, as you have requested, and if our hands are sick and we cannot get the yarn, it is a matter beyond our control. We will keep right behind your order and do the very best we possibly can for you, but the situation does not seem to be improving any with us regarding our hands, and it seems to be impossible to get any more at this season of the year, though we have made every effort to get them, and we doubt if we will be able to get any more for several months yet, as the place from which we can get our new hands is from the country, and they all have little crops now which they will not leave until they have gathered them. We expect to ship you every pound due you on your order, and will make the shipments as soon as we possibly can and with as little delay as possible." Signed as above.

This evidence brings the case clearly within the principle stated, and as to all deliveries due at the time the contract was recognized as broken, there is no error in the charge of the judge below. This, we think, disposes of the appeal, for, according to our estimate, all of the deliveries were past due at the time the contract relation was severed, on April 16, 1904.

The defendant, however, contends that by the terms of the original contract five or six of the weekly instalments were still due on April 16, 1904, and that as to these the general rule should be applied. If this fact be conceded, it could not

avail the defendant. It would indeed show that there was error in the charge as to the portion of yarn remaining undelivered, for, as held in *Roper v. Johnston, supra,* the rule which fixes the date of each instalment, as the determinative period, applies to failures after as well as before an entire breach of contract; and as to yarn remaining undelivered, there has been neither forbearance nor renewed promise. But the verdict and judgment will not be disturbed on this account, because neither the case nor the record affords any means of showing that the defendant's rights were in any way prejudiced.

So far as it appears, there was no decline in the price of yarns from April 16 till the time when the contract would have expired, but the evidence tends to show the contrary. As to yarns remaining undelivered, therefore, and without evidence of any decline in price, it cannot be seen that the error, if committed, has worked any harm to the defendant's cause.

As held in *Cherry v. Canal Co.,* at this term, in order to constitute reversible error, it must appear that the appellant's rights have in some way been prejudiced by the action of the court below. This does not appear in the present case and the judgment below is

Affirmed.

SLEDGE v. LUMBER CO.

(Filed March 6, 1906).

Railroads—Negligence—Contributory Negligence—Damages —Expectancy—Mortuary Tables—Evidence.

1. In an action for personal injuries, an instruction on the issue as to contributory negligence that "If the plaintiff was asleep and was thrown off the car by a sudden jerk caused by the negligence of the engineer or by pulling out the slack, and that said slack was the result of having no brakes on the cars, then the jury should answer the issue 'No,'" is erroneous, for if the negligence of the plaintiff in going to sleep on a moving train concurred with the defendant's negligence as the proximate cause of the injury, this would be contributory negligence.

2. An instruction, on the issue as to damages, that the jury, having determined the decreased earning capacity for a year, must multiply that sum by the expectancy of the plaintiff as fixed by mortuary tables, is erroneous, in that it makes the mortuary tables conclusive as to the plaintiff's expectancy.

ACTION by Willie Sledge against The Weldon Lumber Company, heard by *Judge R. B. Peebles* and a jury, at the August Term, 1905, of the Superior Court of NORTHAMPTON.

The plaintiff alleged that, being an employee of defendant company, working on a logging train in September, 1904, he was permanently injured by the actionable negligence of the defendant company, and demands damage for his injuries—the negligence imputed to defendant being negligent conduct of the engineer, who was also conductor of the train, and who stood towards the plaintiff in the position of vice-principal, and further by the defective condition of the cars and make up of the train, for that there were no brakes on the logging cars, which resulted in allowing "slack" in the train to such an extent that it greatly enhanced the danger of employees. The defendant denied all negligence and claimed there was contributory negligence in that the plaintiff, who was placed

on one of the cars, charged with certain duties, went to sleep while the train was in motion, and that his negligence in this respect was the proximate cause of the injury. Issues were submitted to the jury on the question of the defendant's negligence, contributory negligence on the part of the plaintiff, and as to damage. There was evidence of the plaintiff tending to support the allegations of the complaint and also evidence tending to support the defense.

On a verdict for the plaintiff, there was a motion for a new trial for exceptions noted during the progress of the cause, which was overruled. Judgment for the plaintiff. The defendant excepted and appealed.

Gay & Midyette and *Peebles & Harris* for the plaintiff.
E. L. Travis and *W. E. Daniel* for the defendant.

HOKE, J., after stating the case: Without adverting to the exceptions noted in determining the first issue, and which may not arise on a second trial, the court is of the opinion that the defendant is entitled to a new trial for errors in the charge on the issue as to contributory negligence and on the issue as to damages. On the second issue the court charged the jury as follows: "If the plaintiff was asleep and was thrown off the car by a sudden jerk caused by the negligence of the engineer or by pulling out the slack, and that said slack was the result of having no brakes on the cars, then you should answer the second issue 'No.'"

If the negligence of the plaintiff in going to sleep on a moving train concurred with the defendant's negligence as the proximate cause of the injury, or one of them, this would be an instance within the very definition of contributory negligence, and in such case the issue addressed to that question should be answered yes. Beach Cont. Neg., sec. 7; 7 Am. & Eng. Enc. (2 Ed.), 373. This error would seem to have been an inadvertence on the part of the judge below, but

it appears as an exception in the record and is material, and necessitates a new trial of the issue.

There was an issue framed on the question whether, notwithstanding the negligence of the plaintiff in going to sleep, the defendant could not then have avoided the result, and there is evidence tending to support such a claim. The jury, however, were not required to respond to this issue, and the part of the charge here referred to was confined to the issue of contributory negligence, and the error is not cured by any explanation.

Again, on the issue as to damages, the court told the jury that having determined the decreased earning capacity for a year, they must multiply that sum by 41½, the expectancy of the plaintiff as fixed by the mortuary tables. The error here consists in making the mortuary tables conclusive as to the plaintiff's expectancy; whereas, by the very language of the statute, they are only evidential to be considered with all other testimony relevant to the issue. The Revisal, 1905, sec. 1626, says that these tables shall be received "as evidence, with other evidence, as to the health, constitution and habits of such person, of such expectancy. * * *"

There will be a new trial on all the issues and it is so ordered.

New Trial.

LUMBER CO. v. COREY.

(Filed March 6, 1906).

Contracts—Standing Timber—Statute of Frauds—Vendor and Vendee—Bilateral Contracts—Options.

1. A contract to cut all timber of an indicated measurement on certain land, for a fixed period, passes a present estate in the timber defeasible as to all timber not cut within the limit of the time fixed.

2. The fact that the plaintiff did not sign the contract so as to become in law bound for the payment of the purchase money does not prevent the contract from being a bilateral one, instead of a mere option.

3. To make a contract to sell growing trees binding on the vendor, it is sufficient that the contract be signed by him, and it is not necessary that it should be signed by the vendee.

4. The words of a contract, "all the pine timber that will measure twelve inches at the stump, eighteen inches above the ground, when cut," mean all timber standing on the land which are found to be not less in diameter than 12 inches by measurement to be made 18 inches from the ground, at the time the trees are reached in the process of cutting.

ACTION by Dennis Simmons Lumber Co. against Joseph Corey and wife, heard by *Judge C. M. Cooke* and a jury, at the December Term, 1905, of the Superior Court of MARTIN.

The facts, which in nearly all respects are substantially those stated in the brief of the defendants' counsel where they are well summarized, are as follows: On the 8th of November, 1899, the plaintiff and defendants entered into the following written agreement: "Received this 8th day of November, 1899, of The Dennis Simmons Lumber Co., $90 in part payment for all the pine timber that will measure 12 inches at the stump, 18 inches above the ground when cut, that is or may be on the following land, viz. (here follows the de-

scription of the tract of land on which the timber stood, said to contain 150 acres, more or less): "Which we have sold them for $2,000; $410 to be paid in cash within ten days from this date, the balance ($1,500) to be paid within five years from this date, together with the right and privilege of entering upon the said land and the building of tram-roads only, and the use of undergrowth for building same over said land only, for the period of ten years from this date. When The Dennis Simmons Lumber Co. shall have paid the entire amount of the purchase money we bind ourselves and our heirs to execute to them or their assigns a lease for said timber for the term of ten years and the privileges before named."

The plaintiff paid $410 within ten days after the date of the contract, making with the amount ($90) formerly paid, the sum of $500 paid in all, and leaving a balance of $1,500 to be paid within the five years. Within the said time the plaintiff tendered to the defendants the said balance ($1,500), but accompanied the tender of the money with a demand that defendants execute to the plaintiff a conveyance of the timber, which the plaintiff had caused to be prepared and then offered to the defendants for execution, and which agreed in its terms with the contract, except that it described the timber conveyed or leased as measuring "12 inches or more" at the stump, 18 inches above the ground, when cut, whereas in the contract only the words "12 inches" are used, the words "or more" having been inserted in consequence of information received by the plaintiff that the defendants had insisted that it could not cut under the contract any timber measuring more than 12 inches. The defendants refused to receive the money and execute the conveyance, because it was not drawn according to the exact terms of the agreement. Some time thereafter and within the five years, the defendants prepared and executed a deed in accordance with the terms of the contract, that is, by describing the measurement of the trees sold as "12 inches at the stump, 18 inches above the ground when

cut." This deed was tendered to the plaintiff and the payment of the balance of the purchase money demanded. Plaintiff refused to execute the deed, or to pay the balance of the purchase money unless the defendants would execute the deed it had tendered, as the defendants still insisted that plaintiff had no right under the contract to cut timber measuring more than 12 inches. About four months after the expiration of the five years, the plaintiff brought this suit to compel the defendants to specifically perform the contract. It also alleged in its complaint that the oral agreement between the parties was that it should have the right to cut all trees measuring 12 inches or more at the stump, and prayed that, if the contract did not so express the agreement, it be reformed. Pending this action, the plaintiff notified the defendants that it would cut the timber measuring 12 inches or more. Defendants then commenced an action to enjoin the alleged trespass and obtained a restraining order. The two actions, by consent of the parties and the order of the court, were consolidated and heard as one upon the pleadings, admissions and exhibits, from which the foregoing facts are taken. The court adjudged that the plaintiff, The Dennis Simmons Lumber Company, acquired an interest in the lands described in the pleadings, under the contract of November 8, 1899, to the extent of all the pine timber that will measure 12 inches at the stump, 18 inches from the ground, when cut, together with the other rights and privileges mentioned in the same, for a period of ten years from the said date, and that said plaintiff is entitled to have a deed therefor, and the defendants were thereupon ordered to execute such a deed and, in default of their doing so, that the decree or judgment of the court should have the effect of conveying and transferring the said title and rights as though the conveyance had been duly executed in accordance with the provisions of the statute. The court then, in its judgment, dissolved the restraining order and refused to grant an injunction, and it further

adjudged that the plaintiff, the lumber company, was entitled, under the contract and the deed ordered to be made in pursuance thereof, to cut all timber on the said land measuring 12 inches or more in diameter at the stump, 18 inches from the ground when cut during the said period of ten years. Defendants Joseph Corey and wife excepted and appealed.

Stubbs, Gilliam & Martin for the plaintiff.

Ward & Grimes, S. A. Newell and *F. D. Winston* for the defendants.

WALKER, J., after stating the case: The real, and indeed the vital question in this case is to be found in the ruling of the court that by the contract between the parties, the plaintiff acquired such an estate in the land as entitled it to cut all the pine timber measuring 12 inches and upwards in diameter at the stump, 18 inches above the ground when cut, and in furtherance thereof to enjoy the rights and privileges given by the contract, such as entering upon the land, building tram-ways and using the under growth for the purpose of construction, provided the right to cut and the other rights and privileges shall not last beyond ten years from the date of the contract. There was another question raised by the defendants, namely, that the instrument of November 8, 1899, contained only an option to buy and that the plaintiff had lost all right thereunder to call for the title or to cut the timber and exercise the rights and privileges mentioned therein, by not paying the balance of the purchase money within five years from the date thereof. These propositions we will consider, though not in the order stated.

This court has so recently and so fully considered the question as to the true construction of contracts substantially like the one now under review, that it would seem almost useless for us to add anything to what has already been said. We have decided that such a contract, which should be treated as,

in effect, a conveyance, passes a present estate in the timber defeasible as to all timber not cut within the limit of time fixed by the parties in their agreement. That this is the true construction, as settled by the best considered cases, was clearly indicated in *Bunch v. Lumber Co.,* 134 N. C., 116, though it was not thought necessary in that case to finally and conclusively adopt it, or to determine what is the exact nature of such contracts, as we were able to dispose of the case upon other grounds without deciding that matter. After reviewing some of the authorities in the other States, which were arrayed on opposite sides of the question, and stating the two conflicting views held by the different courts, we distinctly intimated which of the two we thought was more in accordance with the intention of the parties and better supported by the rules of interpretation, by the use of the following language; "While some of the cases in this and other States liken a contract of the kind we are construing to a lease, it may be true that it should not be technically so construed, but that it should be regarded as a conveyance of the timber, or an interest or estate in the timber, upon condition that if it is not cut and removed within a given time, the interest or estate so conveyed shall revest in or revert to the grantor. While we are inclined to adopt this as the better interpretation, and the one more perhaps in consonance with the intention of the parties as disclosed by the language employed by them, yet we think that, however the contract may be considered with reference to the interest or estate of the defendant's assignor, the result in this case must be the same." 134 N. C., at p. 118. And in another part of the opinion it was said: "At the expiration of the time the estate in so much of the timber as had (not) been cut and removed would revert to the vendor, or at least the timber would become his absolute property." 134 N. C., at p. 120, (the word "not" in the passage quoted from the opinion was inadvertently omitted by the printer). We were inclined to take this view

of the matter because of what we considered to be the strong trend of our former decisions; *Moring v. Ward,* 50 N. C., 272; *Dunkart v. Rineheart,* 89 N. C., 354; *Carpenter v. Medford,* 99 N. C., 495. In *Dunkart v. Rineheart,* the contract for the sale of "walnut trees" was executory in form, the defendant merely agreeing to sell them. Referring to this feature of the instrument, the court said: "We are disposed to think that the property in the trees passed under the contract, and that the intent and understanding of the parties that it should so operate appear upon its face." 89 N. C., at p. 358. With much greater reason can it be said that, in our case, the contract passes the property in the "pine timber," as in it the defendants acknowledged the receipt of a part of the purchase money "for all the pine timber" of the indicated measurement and, after describing where it is situated, they refer to the timber as being that "which we have sold to them (the plaintiff) for $2,000," and then appoint the time for the payment of the other instalments. The contract in *Carpenter v. Medford,* in the form of a receipt, was substantially identical with the one given by the defendants to the plaintiff and it was construed as having the legal effect to pass the property in the trees, the same as if it had been in the form of a deed. It is not necessary to prolong the discussion, as the very question is fully considered in the recent case of *Hawkins v. Lumber Co.,* 139 N. C., 160, and the conclusion therein reached was that an estate in the timber passed by the contract.

The fact that the plaintiff did not sign the contract so as to become in law bound for the payment of the purchase money, does not prevent the contract from being a bilateral one instead of a mere option. The defendants' counsel contended that it was unilateral, as the plaintiffs are not bound because they did not sign the contract and are therefore protected by the statute of frauds. He argued from this proposition that time was of the essence of the contract, and that as the plaintiff had not tendered the money within five years

it could not now ask the court to enforce the performance of the contract by the defendants against their consent. There are two answers to this contention, either of which is fatal to it. The plaintiff is seeking to enforce the contract and agrees to pay the balance of the money, thereby waiving the benefit of the statute of frauds. The defendants are the persons sought to be charged and they are the only ones required to sign the memorandum in order to meet the requirement of the statute. It is the party sought "to be charged" who must have signed. *Hall v. Misenheimer,* 137 N. C., 183. The matter is so clearly discussed and aptly illustrated by *Pearson, J.,* for the court in *Mizell v. Burnett,* 49 N. C., 249, which involved a contract for the sale of trees, that we will content ourselves with reproducing here the material portion of the opinion in that case relating to the question: "We are of the opinion with His Honor, that to make a contract to sell growing trees binding on the vendor, it is sufficient that the contract be signed by him, and it is not necessary that it should be signed by the vendee. The statute provides that the contract shall be signed by the 'party to be charged therewith.' This answers the purpose, which is to exclude perjury in an action to enforce the contract. In reference to the other party the statute is silent, and there is consequently nothing to justify the construction, that he is also required to sign. If the vendor binds himself in writing, and is content to take the verbal promise of the purchaser to pay the price, it is his own fault, and he must blame himself for the folly of getting into a situation where he is bound, but the other party cannot be charged if he chooses to insist upon the statute. Common justice, and the general principles of law, require that there shall be a mutuality in contracts; that is, if one party is bound, the other ought to be. But there may be exceptions. Although it is a maxim that a contract is never binding unless there be a consideration, yet, there is a distinction between a consideration and the mutuality of contracts in

reference to the obligation thereof, and the fact that by some other principle of law or the provisions of a statute, one party has it in his power to avoid the obligation, although it suggests a very forcible reason for not entering into a one-sided contract, does not necessarily have the effect of making such a contract void as to both parties. One agrees to deliver, at a future day, a certain article to an infant, in consideration of his promise to pay the price, the contract is not void, although the infant may avoid the obligation on his part, if he chooses to protect himself on the ground of infancy. So, if one agrees in writing to convey land in consideration of a verbal promise of the other party to pay the price, the contract is binding on the vendor, although the vendee may avoid the obligation on his part if he chooses to protect himself under the provisions of the statute. It is not considered in either case that the contract is *nudum pactum* and void for the want of consideration. This is the result of the English decisions in reference to the statute of frauds, and although our statute is not precisely in the same words, yet the substance is the same, the purpose is the same and the difference in the wording is not such as to justify a difference in the construction," citing *Laythoarp v. Bryant,* 29 E. C. L., 469; *Allen v. Bennett,* 3 Taunt., 170. That decision seems to cover entirely the point now being considered. To the same effect is *Green v. Railroad,* 77 N. C., 96. The recital in the contract that there had been a sale, implies or presupposes a promise of the plaintiff to pay the price which is itself the consideration of the defendant's agreement to sell and convey, though strict mutuality may be lacking, as by reason of the statute of frauds, plaintiff's promise cannot be enforced. His present willingness to perform removes this objection. Besides, the very statement in the contract, that they had sold the timber and, in the deed they tendered to the plaintiff, that they had "bargained and sold" it, fully meets and refutes any suggestion that it was intended merely as an option, so as to require a strict performance by

the plaintiff within the time limited. The other answer to defendant's contention is that the plaintiff tendered performance within the time limited, and this incidentally involves the other question raised in the case, and the decision of His Honor thereon, as to what timber was acquired by the plaintiff under the contract. If the deed which accompanied plaintiff's tender of the purchase money was drawn substantially in accordance with the terms of the contract in regard to the dimension of the trees to be cut, the other parts of it not being objectionable, the tender was of course a good one and the plaintiff has complied with his part of the contract even if it be treated as an option. We are of the opinion that while perhaps it would have been better if the plaintiff had tendered a deed expressed in the words of the contract, so far as the provision as to the size of the timber to be cut is concerned, and left the construction of those words to the courts in the event of any controversy with his vendor, yet we do not see how it has forfeited any right under the contract by putting a correct interpretation upon its language, nor do we understand why it should be prejudiced for thus attempting to provide against any possible litigation in the future.

Nothing remains now to be determined but the true meaning of the words of the contract, "all the pine timber that will measure twelve inches at the stump, eighteen inches above the ground, when cut." There can be no well founded doubt, we think, that the vendor intended by the contract to sell, and the vendee to buy, all timber standing on the land which was found to be not less in diameter than 12 inches by measurement to be made 18 inches from the ground, at the time the trees are reached in the process of cutting. If the contract is read in the manner we have suggested, its effect of course will be to pass to the plaintiff the property in timber which is of the dimension stated in its demand upon the defendant, when it tendered payment of the money and also the deed for execution, the terms we have used being but the converse of those

we find in the deed and having of course the same meaning. This must be the true construction of the contract as we cannot for a moment suppose that the plaintiff, under the circumstances, would enter into a contract to cut trees exactly 12 inches in diameter for $2,000, payable within five years with the privilege of ten years to cut them. Such a contract, to say the least of it, would be anomalous, and we agree with His Honor that the defendant was not authorized to put such a construction upon it. The parties surely did not contemplate that so uncertain an interest in the trees should pass. The plaintiff could not well know that there were any trees of that exact dimension in this forest and if any, how many were there, or that any would attain that growth within the period named, nor can it be imagined for what purpose trees of that particular size would be needed, or why the time for cutting them was extended throughout so long a period. The evident purpose was to preserve the small standing trees until they had grown to sufficient size to be valuable as timber and to prevent the forest from being unnecessarily denuded. These and other considerations lead us to reject the defendant's construction of the contract as contrary to the real meaning of the parties.

We have been able to find but one case in which the contract was worded like this one, and in that case it was tacitly conceded that the indicated dimension at the stump was intended as the minimum, as no exception was taken to the ruling of the court in that respect, but the case was strenuously contested on the point as to whether the measurement should include the bark of the tree. *Alcutt v. Lakin,* 33 N. H., 507. It was taken for granted that the other ruling was correct.

It follows from what we have said, that the contract transferred an estate to the lumber company, that it was bilateral, the plaintiff's promise to pay the purchase money, whether express or implied, being a sufficient consideration to sup-

port it, even though there may not have been a strict mutuality, because the plaintiff did not sign it—and lastly, that if it was unilateral or merely an option, the plaintiff made a sufficient tender within the time fixed for its election.

We conclude that the case has been fairly tried upon its merits and that there was no error committed by the court.

No Error.

NORCUM v. SAVAGE.

(Filed March 6, 1906).

Deeds—Husband and Wife—Trust by Implication—Pleadings as Evidence—Declarations Against Interest—Remaindermen — Statute of Limitations — Adverse Possession Against Married Women.

1. Where a deed to the wife, who bought and paid for the land, was stolen or lost without registration, and after her death her husband procured another deed to be executed to himself, the husband held the land, by implication of law, as trustee for their children, subject to his life estate as tenant by the curtesy.

2. An exception to the admission against the defendant of certain sections in his original answer—he having been allowed to file an amended answer—cannot be sustained.

3. A declaration against interest made by a party in possession in disparagement of his title is competent against the defendant who claims under him.

4. Where there was execution against a life tenant in 1869 and sale thereunder and a subsequent conveyance back by the purchaser to him, the seven years' statute of adverse possession would not begin to run against the remaindermen, till his death.

5. The repeal of the disability of coverture by the Act of 1899 (Rev., sec. 363,) was not retroactive—no adverse possession, prior to February 13, 1899, being counted against a married woman.

6. This action to have the trust declared and a conveyance by the defendants, would be barred only by the lapse of ten years.

ACTION by Clara Norcum and others against R. T. Savage, Administrator of J. H. Parker, deceased, and others, heard by *Judge G. W. Ward* and a jury, at the Fall Term, 1905, of the Superior Court of GATES.

W. M. Bond, L. L. Smith and *H. S. Ward* for the plaintiffs.

George Cowper for the defendants.

CLARK, C. J. The *feme* plaintiffs are the children of J. H. Parker, by his first wife, Frances. The defendants are his children by his second wife. The jury found that the deed to Frances, who bought and paid for the land, was stolen or lost without registration. It was not controverted that after her death, J. H. Parker procured another deed for the land to be executed to himself by the heirs at law of the grantor. By such conveyance, J. H. Parker held the land, by implication of law, as trustee for the plaintiffs, subject to his life estate as tenant by the curtesy. *Flanner v. Butler,* 131 N. C., 157.

Exceptions 1 and 2 are to the admission against the defendants of certain sections in their original answer—they having been allowed to file an amended answer—but the exceptions cannot be sustained. *Gossler v. Wood,* 120 N. C., 69; *Cummings v. Hoffman,* 113 N. C., 267; *Guy v. Manuel,* 89 N. C., 83; *Adams v. Utley,* 87 N. C., 356. The third exception is to the testimony of a disinterested witness that he heard J. H. Parker says that the aforesaid deed to Frances had been stolen or lost, and that he did not know how he could get another. This was a declaration against interest made by a party in possession in disparagement of his title, and the defendants claim under him. It is competent against them. *Shaffer v. Gaynor,* 117 N. C., 17.

Execution against J. H. Parker in 1869 and sale thereunder and a subsequent conveyance back by purchaser to him were shown, but the seven years statute of adverse possession would not begin to run against the plaintiffs till his death, for at such execution sale only his tenancy by the curtesy passed (and not even that if his marriage was subsequent to the act of 1848), and of course the deed by the purchaser back to him could convey no more. If the latter was color of title, still the statute could not begin to run against the plaintiffs till his death, since they could have no claim to recover possession till then. *Everett v. Newton,* 118 N. C., 919. At the time of their father's death, both plaintiffs were married. The repeal of the disability of coverture by the Act of 1899 was not retroactive. By its terms no adverse possession, prior to 13 February, 1899, should be counted against a married woman. Revisal, section 363.

The action, so far as it seeks to have the trust declared and a conveyance by the defendants, would be barred only by the lapse of ten years (*Norton v. McDevit,* 122 N. C., 759,) which time began to run against the plaintiffs by the above statute, on 13 February, 1899.

No Error.

TANNER v. LUMBER CO.

(Filed March 6, 1906).

Railroads—Fellow Servant Act—Defective Car—Assumption of Risk—Contributory Negligence—Master and Servant.

1. The contention that the Fellow Servant Act (Rev., sec. 2646,) applies to the defendant, Frank Hitch Lumber Co., cannot be determined where its answer denied that it owned or operated the logging railroad and no appropriate issues were submitted.

2. Where the defendant undertook to furnish the plaintiff transportation on its log train to and from "quarters," it was its duty to see that such transportation was rendered as reasonably safe as the character of it would admit.

3. Where there was evidence tending to prove that one of the standards used to hold the logs in place was gone, an instruction that "when the plaintiff went on the log car for the purpose of riding, he assumed the risk of all the damages incident to riding on a log train," was erroneous in that the court should have further stated that the plaintiff assumed no risk resulting from a defective car.

4. If the plaintiff knew that the standard was gone when he mounted the loaded car, and if in consequence thereof the danger to himself was so obvious that no man of ordinary prudence would have ridden on it, then the plaintiff did assume the risk and would be guilty of such contributory negligence as would bar a recovery.

5. The master is liable for negligence in respect to such acts and duties as he is required, or assumed to perform, without regard to the rank or title of the agent entrusted with their performance.

ACTION by David Tanner against Frank Hitch and Frank Hitch Lumber Co., heard by *Judge Jas. L. Webb* and a jury, at the Fall Term, 1905, of the Superior Court of EDGECOMBE.

The plaintiff was employed by the day to haul logs for the

defendant. His lodgings provided by the defendant were at Speed, some five miles from the scene of the logging operations. The defendant transported the plaintiff to and fro daily on his log train, which went to the woods empty in the morning and returned loaded in the evening. On the last return trip in the evening, the plaintiff and other daily laborers rode on top of the loaded log cars back to their lodgings. There were no other cars on the train. There was evidence tending to prove that one of the standards for holding the logs in place on one of the cars was gone and its place supplied with a knot or shoulder insufficient for the purpose. The plaintiff had taken his place as usual on this car to return to his lodgings and the logs tumbled off because of the absence of the corner standard and threw the plaintiff in front of the car and crushed his leg. There was evidence tending to prove that one Armstrong was general superintendent of all the logging operations, and that one Richardson had charge of the train and its crew, and loaded it with a logging machine, and whose duty it was to see that the cars were safely loaded. The plaintiff had no connection with the operations of the train or loading it.

The following issues were submitted:

1. Was the plaintiff injured by the negligence of either defendant, if so injured, by which defendant?

2. Was the plaintiff guilty of contributory negligence?

3. If the plaintiff was so injured, what damage has he sustained?

From the judgment rendered, the plaintiff appealed.

W. O. Howard for the plaintiff.

J. L. Bridgers for the defendant.

BROWN, J., after stating the case: 1. The contention that the Fellow Servant Act (Revisal, section 2646,) applies to the defendant, the Frank Hitch Lumber Company, cannot

be determined upon the face of the record. The two defendants filed separate answers, and that of the lumber company specifically denies that it owned or operated the logging railroad mentioned in the complaint. The answer of Frank Hitch states that he personally owned and operated the road himself. No appropriate issues were tendered by the plaintiff or submitted by the court, and consequently this necessary fact is left undetermined. The act referred to applies only to "any railroad company operating in this State." In order to pass upon this important question, so far as the defendant company is concerned, it is essential to ascertain the truth of this contested fact, and further that its charter should be in evidence to the end that the court may see whether it is a "railroad company" within the meaning of the statute. The name gives no indication and the record is silent except the testimony of the plaintiff that some of the cars were labled "Frank Hitch Lumber Co." It does not necessarily follow from the label on the car that the defendant company was operating this road although, unexplained, it is some evidence of that fact.

His Honor instructed the jury that when the plaintiff went on the log car for the purpose of riding, he assumed the risk of all the dangers incident to riding on a log train. As a general statement of the law this proposition is correct, but it does not go far enough and was liable to mislead the jury. The judge should have further stated that the plaintiff assumed no risk which was incurred by reason of a defective car. There was evidence tending to prove that one of the standards used to hold the logs securely in place was gone, and there was no evidence that the plaintiff was apprised of the danger, liable to result, when he mounted the loaded car. Inasmuch as it was the master's duty (he having undertaken it according to the plaintiff's contention) to furnish his laborers transportation on his log train to and from the "quarters," it was his further duty to see that such transpor-

tation was rendered as reasonably safe as the character of it would admit. While the plaintiff assumed the risks incident to riding on loaded log cars, he did not assume any risk resulting from a defective car. *Hicks v. Manufacturing Co.*, 138 N. C., 319; *Pressly v. Yarn Mills, ibid.*, 410. If the plaintiff knew that the standard was gone when he mounted the loaded log car, and if in consequence thereof the danger to himself was so obvious that no man of ordinary prudence would have ridden on it, then the plaintiff did assume the risk and would be guilty of such contributory negligence as would bar a recovery. *Ibid.*

3. Was Richardson a fellow servant with the plaintiff so as to bar a recovery? The plaintiff contends that Richardson was delegated by Hicks, the master, to load the cars securely, and that for this purpose Richardson was in command of the loading machine and train crew; that the plaintiff was a daily hireling to saw logs in the woods and had no connection with Richardson's force; that the master assumed the duty to furnish him transportation to and from the "quarters;" that it was therefore the master's duty to see that this transportation was as reasonably safe as the nature of it permitted; that it was the master's duty to see that the logs were secured with reasonable safety on the cars, so that the laborers employed in the woods could ride on them without imminent danger of being thrown off; that this duty was delegated by the master to Richardson to perform, and that the master is liable for Richardson's negligence in loading a car with one corner standard gone.

If such be the facts, we fully sustain the plaintiff's contention. The rigorous rule that once obtained has been greatly modified. The true rule now is more humane and holds the master is liable for negligence in respect to such acts and duties as he is required, or assumed to perform, without regard to the rank or title of the agent entrusted with their performance. As to such acts the agent occupies the place of the

master and he is liable for the manner in which they are performed. *Flake v. Railroad,* 53 N. Y., 549; *Crispin v. Babbitt,* 81 N. Y., 521. If the negligent act of one servant is done in the discharge of some positive duty which the master owed to another servant, then, negligence in the act upon the part of the servant is the negligence of the master.

This principle of the law of master and servant is laid down in many adjudications. *Railroad v. Baugh,* 149 U. S., 368; *Railroad v. Seeley,* 54 Kan., 21; *Minneapolis v. Lunden,* 7 C. C. A., 344; *Coal & Coke Co. v. Peterson,* 136 Ind., 398; *Justice v. Pa. Co.,* 130 Ind.; *Hough v. Railroad,* 100 U. S., 213. The Supreme Court of Pennsylvania thus expresses it: "Whenever it is sought to hold the master liable for the act or neglect of his foreman, the question to be first considered is whether the negligence complained of relates to anything which it was the duty of the master to do. If it does, then the master is liable, for he must see at his peril that his obligations to the workmen are properly discharged." *Ross v. Walker,* 139 Pa., 42; *Gunter v. Granville Mfg. Co.,* 18 S. C., 270.

It follows, therefore, from all the modern authorities that Hitch's liability for Richardson's alleged negligence is not to be determined by the latter's authority to hire and discharge hands, or to purchase and change machinery, and the like. The true test is whether Richardson was entrusted by Hitch with the performance of any duty that Hitch owed the plaintiff. If he was, and failed to perform it, the defendant is liable. This principle applies alike to individuals and corporations. The defendant undertook to transport his laborers to and from their quarters on his loaded log cars. He permitted them to ride on them, and knew it was their only means of transportation. The uncontradicted evidence shows this. It therefore became the defendant's duty, of which he could not relieve himself, to make such transportation as reasonably safe as the nature of it permitted. Care in loading

the cars was one of the prime elements of safety, as the laborers sat on top of the logs. The duty of properly loading the cars was entrusted to Richardson. If he negligently loaded a log car with logs when one of the corner standards was gone, with no proper and sufficient substitute in its place, it was a negligent act for which the master is responsible. If, by reason of such negligence, the plaintiff was thrown off and injured, the defendant is plainly liable unless he can establish such contributory negligence as will bar a recovery.

New Trial.

FULLER v. RAILROAD.

(Filed March 6, 1906).

Railroads—Live Stock—Negligence—Questions for Jury.

1. In an action to recover damages for an alleged injury to a mare, an instruction "That if the jury find that the mare arrived at a junction at 5:15 p. m., and that the defendant had stables at that point; and the defendant knew that it would not be able to forward the mare to her destination till the next morning, and kept her in its car on the track all night without other food or attention than has been testified to, the defendant was guilty of negligence, and if you find that the mare was damaged in consequence of such negligence, you will answer the first issue 'Yes,'" is erroneous.

2. Whether the animal should have been kept in the car or put in the stable, and what food and attention she should have received under the circumstances, were evidently questions of fact for the jury, to be considered by them in passing upon the question of negligence.

3. Negligence is the omission to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.

FULLER *v.* RAILROAD.

ACTION by R. F. Fuller against Atlantic Coast Line Railroad Co., heard by *Judge Jas. L. Webb* and a jury, at the October Term, 1905, of the Superior Court of FRANKLIN.

The evidence tended to show that on Monday, November 14, 1904, there was delivered to the Atlantic & North Carolina Railroad Company at New Bern, a brown mare for shipment to the plaintiff at Springhope. In the course of the transit she was received by the defendant company at Goldsboro, the junction of the two roads, on the morning of November 15, at 9:30 o'clock, and at 12 o'clock of the same day she was watered, fed and exercised by one of the employees of the defendant, and was forwarded by the next train to South Rocky Mount, the junction of the main line and the Springhope branch of the defendant's road, where the train arrived at 5:15 o'clock p. m., the same day. There, the car in which the mare was shipped from New Bern was placed on the Springhope track, and remained there until 6 o'clock the next morning, when it was taken to Springhope by the first train out from the junction after its arrival. There was no delay in the transportation of the mare after she left New Bern, she having been carried forward by regular trains in due course and delivered to the agent of the plaintiff at 11 o'clock on Wednesday, November 16. The car in which the mare was shipped was one of the best felt-lined and ventilated cars in use on the line of the defendant—such as are used for transporting tropical fruits—and she had the car all to herself. There was evidence tending to show that the mare was in good condition when turned over to the plaintiff's agent, and other evidence tending to show the contrary. There was no evidence as to the actual state of the weather during the night of November 15, when the mare was on the car at South Rocky Mount, where, it is alleged by the plaintiff, she contracted cold which developed into pneumonia, but from which she recovered.

This action is brought to recover damages for the injury

to the mare alleged to have been caused by the defendant's negligence. The court, among other instructions, gave the following at the request of the plaintiff: "If the jury find that the mare arrived at South Rocky Mount at 5:15 p. m., on November 15, and that the railroad company had stables at that point, and the company knew that it would not be able to forward the mare to Springhope till the next morning, and kept the horse in its car on the track at South Rocky Mount all night without other food or attention than has been testified to, the company was guilty of negligence; and if you find that the mare was damaged in consequence of such negligence, you will answer the first issue 'yes.'" To this instruction the defendant excepted. It is not necessary to refer to the other parts of the charge or to the other exceptions. There was a verdict for the plaintiff, a motion by the defendant for a new trial which was denied, and a judgment upon the verdict. The defendant excepted and appealed.

W. M. Person for the plaintiff.
F. S. Spruill for the defendant.

WALKER, J., after stating the case: The instruction given to the jury at the request of the plaintiff was erroneous, as by it the court undertook to decide as matter of law what really was a composite question of law and fact. Whether the animal should have been kept in the car or put in the stable, if the defendant had one at South Rocky Mount, and what food and attention she should have received under the circumstances, were evidently questions of fact for the jury, to be considered by them in passing upon the question of negligence, they being guided in arriving at their conclusion, as to the ultimate fact of negligence, by the charge of the court as to the measure of the defendant's duty. The evidence was not clear as to whether the defendant had a stable at that place, the witness Gordon having been asked the question, "Has the

defendant any stock-pen or stable in South Rocky Mount?" and answered in the affirmative; but we have treated the instruction as if the question had been expressed conjunctively instead of disjunctively, and have assumed that the defendant had a stable there. The instruction distinctly implies that the mare should have been stabled for the night, otherwise there would have been no use in referring to the stable at all. Whether it was better to have kept her in the car or to have put her in the stable, was also a question for the jury to be considered by them in making up their verdict upon the question of negligence. The facts recited in the instruction did not in law constitute negligence *per se,* but were no more than evidentiary facts. The jury might have decided that the acts and conduct of the defendant did not cause the sickness of the animal, but that the cold was contracted before she was received by the defendant, or was an unavoidable incident of the journey and was not attributable to any negligent act or omission of the defendant. Notwithstanding the facts recited, the defendant may have been free from blame. It is true the judge told the jury they must find that the mare was injured in consequence of the negligent acts of the defendant, which he recited in the instruction; but the fault in the charge is that the jury had already been told that certain facts constituted negligence, which the law did not so regard and which the jury, if properly instructed, may have found did not make out a case of negligence under the circumstances. It is not difficult to see how the jury may have been induced to find that the alleged acts of the defendant, recited in the instruction, caused the injury when they had been told that the law characterized them as negligent. They might, in such a case, readily impute the injury to the defendant's alleged wrongful acts.

It may be admitted as an axiom that what is negligence is a question of law, and in this case it is the failure to exercise that degree of care which the nature of the situation and the

circumstances suggested and required. The approved meaning of the term is the omission to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The duty, thus imposed, is dictated and measured by the particular exigencies of the occasion. The essence of the fault is either in omission or commission, negligence being either active or passive. *Railroad v. Jones,* 95 U. S., 439; *Blythe v. Water Co.,* 11 Exch., 784; *Carter v. Lumber Co.,* 129 N. C., 203. This embodies what is known as the rule of the prudent man, which we have adopted, and we believe most of the courts of this country have recognized and accepted as the best and the true standard by which to guage responsibility in actions for negligence, and by which to determine whether or not there has been actionable negligence, if the injury was the natural and proximate consequence of the act complained of. Negligence is defined as the juridical cause of an injury, and therefore actionable or followed by liability to another, when it consists of such an act or omission on the part of a responsible person, as in ordinary natural sequence immediately results in such injury. *Basnight v. Railroad,* 111 N. C., 592; Wharton Neg., sec. 73. And it should be added, the party complained of must, by the exercise of ordinary care, have been able to foresee that harm or injury would result. *Carter v. Lumber Co.,* 129 N. C., 203; *Raiford v. Railroad,* 130 N. C., 597; *Frazier v. Wilkes,* 132 N. C., 437; *Railroad v. McEwen,* 38 L. R. A., 134; *Drum v. Miller,* 135 N. C., 204.

It is not intended to say that there may not be facts which, if admitted, established or proved, will constitute negligence as matter of law. We are not dealing with any such question. It is sufficient, in this case, to hold that the court should have submitted the case to the jury upon the evidence and with proper instructions as to what would in law consti-

tute negligence, leaving the jury to find whether there was negligence or not, and if there was, whether it proximately caused the injury.

New Trial.

ALSTON v. CONNELL.

(Filed March 6, 1906).

Specific Performance—Contracts—Options—Extension of Time—Statute of Frauds—Estoppel—Pleadings.

1. A paper writing, by which the defendant binds himself at any time previous to a fixed date, to sell a certain tract of land to anyone whom the plaintiff may direct for a designated sum, is a unilateral contract or an option, where the plaintiff has never obligated himself to pay said sum.

2. In an action to compel specific performance of an option on land, where it appears that the plaintiff was arranging to raise the money within the time required by the option, when he was requested by the defendant that a postponement was desired for a year and the plaintiff agreed to the proposition and within the time fixed by the postponement, went to the defendant and tendered the amount and the same was refused, *held*, the defendant is estopped from pleading the statute of frauds or from denying his obligation and the plaintiff is entitled to specific performance.

3. An owner of land, who would insist upon strict performance by a prospective purchaser as a condition precedent to an action by the latter for the specific performance of an option to purchase, must not himself be the cause of the breach.

4. Where all the facts which go to make out an estoppel are set out in the pleadings, the estoppel is sufficiently pleaded, though it is not claimed as an estoppel in terms.

ACTION by P. G. Alston and others against W. A. Cornell and others, heard by *Judge E. B. Jones* and a jury, at the September Term, 1905, of the Superior Court of WARREN.

The facts pertinent to an understanding of the case, admitted and established by the verdict, are as follows:

Prior to March 7, 1892, Mrs. Ruina Alston, having become indebted to Thomas Connell in the sum of $2,440, executed a mortgage to him to secure said indebtedness on her plantation known as "Tusculum," containing about 600 acres. Being unable to pay, on March 7, 1892, she conveyed the property to her son, R. W. Alston, for $500, to be paid to herself and the assumption by R. W. Alston of the indebtedness to Thomas Connell. This was assented to by Thomas Connell, and thereupon R. W. Alston, grantee in the deed, executed a mortgage in the form of a deed of trust to Thomas Connell, Jr., to secure the debt due to his father, Thomas Connell. After the execution of this deed of trust, to-wit, on April 17, 1897, R. W. Alston, finding he could not pay this debt, conveyed the property, charged with this indebtedness, to Mrs. B. C. Alston, wife of his brother, P. G. Alston. The grantee undertook to pay off the indebtedness—Thomas Connell, the creditor, assenting to the arrangement—and thereupon the grantee, her husband, P. G. Alston, and Thomas Connell entered into a contract as follows: "This agreement made and entered into this 17 day of April, 1897, between P. G. Alston and wife, Bettie Alston, of Franklin County, N. C., parties of the first part, and Thomas Connell, of Warren County, N. C., witnesseth: 1. That the parties of the first part have this day put said Connell in possession of Mrs. R. T. Alston's 600 acre home place in Fishing Creek Township in Warren County, the same being the tract of land which said Connell now holds a deed of trust mortgage against, which was made by R. W. Alston and wife, Pattie, and they being unable to repair the dwelling house, pay insurance and taxes, build tenant houses, etc., they hereby agreed that said Connell proceed to re-roof the back wing of dwelling and repair windows and have dwelling insured in favor of said Connell to further secure the interest of the

amount due him on said land, interest, unpaid taxes and aforesaid house repairs, insurance fees, etc. 2. That said Connell's term of possession begins April 20, 1897, and ends January 1, 1901, in which time he shall have full landlord's power as renting and collecting, and that he shall pay all rents coming into his hands on the above mentioned claim which he holds against said estate, at the time he receives said rents. It is further understood that the rents of 1897 are all or nearly all spent by P. G. Alston prior to Connell's becoming landlord. 3. That parties of the first part agree to build and fully complete the two double tenant houses with rock or brick chimneys by December 1, 1897. But should they fail to do so, they hereby empower said Connell to build them and charge the estate with the amount they cost to complete. Parties of the first part do further agree that on or before January 1, 1898, they will reduce the whole amount of indebtedness due to said Connell to $2,500. 4. That should said P. G. Alston and Bettie Alston fail to fully comply as agreed, then they hereby authorize said Thomas Connell, without further objection or complaint, to have said land and premises sold under the trust deed securing said indebtedness on said land and premises, at any time said Connell sees proper to do so. By which said Connell is hereby authorized. Witness our hands and seals this 20 April, 1897. P. G. Alston, Jr. (Seal.) B. C. Alston. (Seal.)"

In pursuance of this agreement Thomas Connell entered into possession of the property and lived there under the agreement till December 1, 1898, when, under an allegation that default had been made in the conditions of the above agreement, he caused the trustee to advertise the property for sale, and on the day of sale, December 5, 1898, agreed with P. G. Alston that if the sale were allowed to proceed he would buy in the land, take title thereto and convey to P. G. Alston on the payment to him of $3,502, the amount of the mortgage debt and interest and including, in addition thereto,

$250 for repairs on the place. Thereupon the sale took place and Thomas Connell bought in the farm of 600 acres for $2,000, took a deed therefor from Thomas Connell, Jr., the trustee, and entered into possession of the property.

After this agreement and sale, permitted to proceed by reason thereof, the parties drew up a paper writing, and Thomas Connell, in pursuance of this arrangement, executed and delivered to P. G. Alston a paper writing as follows: "This is to certify that I, Thomas Connell, did on this the 5 day of December, 1898, purchase the 600 acre tract known as the 'Tusculum farm,' and doth thereby bind himself, heirs and assigns, at any time previous to December 1, 1899, to sell the same to whom P. G. Alston may direct for $3,502. Witness, etc. Thomas Connell. (Seal.) Two hundred and fifty dollars of which is for improvements for 1899, which, if not used, or any part thereof, is to be returned to the said P. G. Alston. (Signed) Thomas Connell."

Prior to the time limited in this contract P. G. Alston had arranged or was arranging to procure and pay the sum stipulated, when the defendant, Thomas Connell, requested that the time for payment of the same be extended to January 1, 1901. This was assented to by P. G. Alston, and before the time fixed, the plaintiff, having the amount of money in hand, went to Thomas Connell and offered him the full amont due. This was refused. Thomas Connell afterwards died and P. G. Alston instituted this action to enforce the obligation of the contract against his heirs and personal representatives on the facts here stated.

Pending the action, B. C. Alston, wife of P. G. Alston, having died, her children and heirs at law were made parties plaintiff and adopted the complaint already filed. There was an answer admitting some and denying other allegations of the complaint, and on issue joined there was a verdict as follows:

1. Was Ruina T. Alston prior to March 7, 1892, the owner

of the land in controversy, and did she convey the same to R. W. Alston, as alleged in the complaint? Yes. 2. Did R. W. Alston and wife on March 7, 1892, execute to Thomas Connell, Jr., the deed of trust mentioned in paragraph 5 of the complaint? Yes. 3. Did the plaintiffs and those under whom they claim acquire the equity of redemption of R. W. Alston and wife for consideration prior to the sale made by the trustee, as alleged in the complaint? Yes. 4. Did Thomas Connell, Sr., buy in the land in controversy at the sale made by the trustee on December 5, 1898, in pursuance of an arrangement entered into with P. G. Alston, Jr., before the sale, agreeably to the terms of the instrument set out in the complaint and referred to in the evidence as Exhibit A? Yes. 5. Did P. G. Alston, Jr., prior to December 1, 1899, offer to pay to Thomas Connell the said $3,502 in accordance with the terms of said contract and agreement? 6. Was there any written renewal or extension of said paper writing before December 1, 1899? No. 7. Did Thomas Connell, at his own request prior to December 1, 1899, verbally extend the time for the payment of the $3,502 to January 1, 1901? Yes. 8. If said time was extended to January 1, 1901, verbally by Thomas Connell, was there any consideration for it? Yes. 9. Did P. G. Alston, being ready and able to do so, on the 31st day of December, 1900, offer to pay to Thomas Connell, Sr., the sum of $3,502, and did said Connell refuse to accept the same? Yes.

Upon the verdict, there was judgment for the plaintiffs and the defendants excepted and appealed.

F. S. Spruill and *T. W. Bickett* for the plaintiffs.
Walter A. Montgomery and *T. T. Hicks* for the defendants.

HOKE, J., after stating the case: The heirs at law and personal representatives of B. C. Alston, wife of P. G. Alston, the original plaintiff, having been made parties plaintiff, it may

be that on the facts set out in the complaint and indicated in the testimony, that these heirs might successfully assert a right to redeem the property, either on the idea of a parol trust or more simply by holding that under all the facts and circumstances suggested, the relationship of mortgagor and mortgagee had never terminated between them and Thomas Connell, the ancestor of the defendants, and under whom they claim. This position, however, is not open to the plaintiffs in the present condition of the record, for the reason that the suit was originally instituted by P. G. Alston, and complaint filed, seeking to enforce his rights under his written agreement of date December 5, 1898, and under which Thomas Connell obligates himself to convey the property. The heirs at law of B. C. Alston make themselves parties plaintiff and seek the same relief, and while the pleadings set forth the entire facts and some evidence is offered tending to sustain a claim in behalf of these heirs, the issues framed and passed upon are not decisive of those rights, but are addressed to the question of this written agreement and the facts especially bearing thereon, and are only determinative of the interest arising thereunder. The rights of the parties therefore are considered as they may arise upon this written paper and the issues determined in reference to the same.

On that question the court is of opinion that this paper amounts only to an option by which Thomas Connell, on December 5, 1898, bound himself to P. G. Alston to convey the 600 acre Tusculum farm on the payment to him of $3,502 at any time previous to December 1, 1899. P. G. Alston had never taken the place of debtor to Thomas Connell, and neither in this nor any other paper, so far as we can discover, has P. G. Alston ever obligated himself to pay this or any other sum. There is consideration for the agreement in permitting Thomas Connell to proceed with the sale and buy the property at $2,000, in apparent violation of the agreement between himself and P. G. and Betty Alston, and

other considerations might be suggested; but P. G. Alston, not having provided to pay, we agree with the defendants, that this was a unilateral contract, commonly called "an option," a proposition to sell, binding and irrevocable by the owner till the stipulated time expired, but in which, time was of the essence under ordinary circumstances, and in cases like the present, requiring payment of the price as a condition precedent. 21 Am. & Eng. Enc. (2 Ed.), 931, and authorities cited. We do not conclude, however, with the defendants that the plaintiffs are barred of relief by reason of the statute of frauds; for, if it be conceded that this statute under ordinary conditions would avail the defendants, the court is of opinion that on this paper and the facts established by the verdict the defendants are estopped from pleading the statute and from denying their obligation under the contract on that ground.

These facts, so established, declare that the plaintiff had arranged or was arranging to raise the money within the time required by the option, when he was notified and requested by the defendant that a postponement was desired for a year, till January 1, 1901, and the plaintiff agreed to the proposition. Within the time fixed by the postponement, the plaintiff went to the defendant with the money, tendering the amount required by the agreement and the same was refused. The plaintiff, having consented to the delay at the request of Thomas Connell, will be taken to have been ready and willing to perform at the time stipulated in the written agreement; having tendered the amount due within the period fixed by the postponement, he is in no default, and the extension having been given at Thomas Connell's request and for his convenience, when the extended agreement itself and all the circumstances clearly implied that he regarded it as a valid and binding contract and that he intended to live up to its terms, the law will not permit him now to repudiate its obligations, invoke for his protection the statute of frauds

and defeat the plaintiff's recovery, who has forborne a timely performance by reason of Thomas Connell's request and in reasonable reliance on his assurance.

This position is in accord with sound principles of justice and is well sustained by authority. In *Hickman v. Haines,* Law Reports, 10 C. P., at p. 603, it is said: "The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance is to say the least very startling, and if well founded will enable the defendants in this case to make use of the statute of frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the court to countenance such a doctrine." Again, at page 605: "The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to do by the Statute of Frauds. But, so far as this principle has any application to the present case, it appears to us rather to preclude the defendants from setting up an agreement to enlarge the time for delivery in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it." And at page 607: "In conclusion we think that, although the plaintiff assented to the defendant's request not to deliver the 25 tons of iron in question in June, he was in truth ready and willing then to deliver them, and that the defendants are at all events estopped from averring the contrary."

In *Clarno v. Greyson,* 30 Oregon, 111, it is said: "That an owner of land, who would insist upon strict performance by a prospective purchaser as a condition precedent to an action by the latter for the specific performance of an option to purchase, must not himself be the cause of the breach;" and in the opinion of the court by *Wolverton, J.,* at p. 127, it is said:

"Another proposition insisted upon, which is sound in law and based on good morals, is that he who would insist on strict performance must himself not be the cause of the breach. His own wrong can never operate under the sanction of law to his advantage. This may be regarded as fundamental and no authorities are necessary to support it."

In *Barton v. Gray,* 57 Mich., 630, it is held that "The defense urged is not open to defendant for another reason: 'No person can be heard to complain of an injury caused by the act or conduct of a party to which he has consented, and no one who causes or sanctions the breach of an agreement can recover damages for its non-performance or interpose it as a defense to an action upon the contract.' "

In *Thompson v. Poor,* 147 N. Y., at p. 409, *Andrews, J.,* says: "It makes no difference, as we contend, what the character of the original contract may be—whether one within or without the statute of frauds—the rule is well understood that if there is forbearance at the request of a party, the latter is precluded from insisting on a performance at the time originally fixed by the contract as a period for action."

The case of *Sheridan v. Nation,* 159 Mo., 54, is very similar in principle to the one before us, and the opinion also finds support in *Swain v. Seamans,* 76 U. S., 254. A line of cases in our State in reference to renewing a contract obligation, barred by the statute of limitations, has strong analogy to the decision we now make. The statute provides that such an obligation can only be renewed by a writing signed by the party charged. In *Haymore v. Commissioners,* 85 N. C., 268, it is held that "The defendants will not be allowed to set up the statute of limitations in bar of the plaintiff's claim, when the delay, which would otherwise give operation to the statute, has been induced by the request of the defendants expressing or implying their engagement not to plead it." There are many other authorities with us to like effect.

We hold that on principle and authority, the defendants are estopped from pleading the statute of frauds in this case or from denying their obligation under the contract, and the plaintiffs are entitled to the decree and specific performance as prayed for in the complaint.

It has been suggested that the estoppel is not pleaded, but this suggestion is without force. There is some doubt if a plaintiff is required to plead an estoppel in order to avail himself of it except in reply to a counterclaim. *Stancill v. James,* 126 N. C., 190. But the more complete answer is that all the facts which go to make out the estoppel are set out. Everything does appear in the pleading which goes to make out this position except simply claiming it as an estoppel in terms, and this is not of the substance.

There is no reversible error in the record and the judgment below is

Affirmed.

CLARK, C. J., did not sit on the hearing of this appeal.

WITHERINGTON v. HERRING.

(Filed March 6, 1906).

Trusts—Revocation.

1. The words, in a letter from plaintiff's intestate to the defendant, "Until I give you further instructions, hold the sum of $1,000 for the support of my (natural) child in case of my death, for such a time as it may hold out," create a trust and not an agency that would expire with the death of the principal.

2. The trust was not revoked by the will which requests testator's wife to carry out his wishes in regard to the care and custody of the child, but makes no provision for the child beyond the request to his wife, and there is no instruction or reference in the will to this fund and no further instructions were sent to the defendant.

3. To create a trust, no technical terms need be used. It is sufficient if the language shows the intention to create a trust, clearly points out the property, the disposition to be made of it and the beneficiary.

4. A power of revocation may be reserved and is perfectly consistent with the creation of a valid trust. If never exercised during the lifetime of the donor and according to the terms in which it is reserved, the validity of the trust remains unaffected.

ACTION by M. S. Witherington, Administrator, with the will annexed of W. A. Herring, against N. B. Herring, heard at the November Term, 1905, of the Superior Court of WILSON. From a judgment for the defendant, the plaintiff appealed.

Mark Squires, Shepherd & Shepherd and *Aycock & Daniels* for the plaintiff.

Connor & Connor, F. A. Woodard and *C. E. McCullen* for the defendant.

CLARK, C. J. W. A. Herring, resident in Mississippi, assumed the care, education and support of his natural child which, through his brother, the defendant, Dr. N. B. Herring, he placed in the custody of a lady in this State. There came into the hands of said defendant the sum of $1,500, which he had collected for W. A. Herring, in regard to which the latter wrote Dr. Herring 19 April, 1902: "Retain what means of mine you have on hand until I am able to think and act further, and if I never do, use as you see proper as in the first arrangements made." Again on 13 September, 1902, W. A. Herring wrote Dr. N. B. Herring in regard to the care and custody of the child, and added, "In the meantime, until I give further instructions, hold the sum $1,000 and what of the first fund is left, for the support of the child in case of my death, for such a time as it may hold out." In January, 1903, W. A. Herring died without having given any further instructions, and N. B. Herring, having already disposed of part of this fund according to his instructions, in the support and care of the child, there was in his hands at the death of W. A. Herring, $868.97, unimbursed. In the first item of his will, the latter mentions this child and states that he has supported her from her birth and will continue to do so if he lives, but if he should die first he turns over the care and custody of the child to his wife, and requests her to carry out his wishes in regard to the child, and, after bequeathing and devising certain property to his wife, there is a residuary clause in the will in favor of his nieces, but there is no provision for the child beyond the above request to his wife. There is no instruction or reference in the will to this fund and none was sent by W. A. Herring to Dr. N. B. Herring, subsequent to the above letter of 13 September, 1902.

This action is by the personal representative of W. A. Herring to recover the fund in hands of N. B. Herring. There is no allegation that it is needed for the payment of debts, and the only question is whether N. B. Herring held

the fund as trustee, or as an agent, whose agency would expire with the death of his principal.

The words "until I give further instructions, hold the sum $1,000 and what of the first fund is left, for the support of the child in case of my death, for such a time as it may hold out," clearly indicate a trust. There were no further instructions, and there is no provision for the child in the will. The relationship and the attitude of the father as to the custody, care and education of the little girl, both in his correspondence with his brother and by the request made of his wife in his will, strengthen our view that he had no intention to revoke the trust by implication, and there is no express revocation.

The declaration of a trust in personalty is not required to be in writing, and if in writing, it may be contained in letters or other writings. 28 A. & E. Enc. (2 Ed.), 880. Indeed, section 7 of the Statute of Frauds has not been re-enacted in this State. *Ibid.*, 876. No technical terms need be used. It is sufficient if the language used shows the intention to create a trust, clearly points out the property, the disposition to be made of it and the beneficiary. 1 Bispham Eq., sec. 71; 28 A. & E. Enc. (2 Ed.), 910.

A power of revocation may, however, be reserved and is perfectly consistent with the creation of a valid trust. If never exercised during the life time of the donor and according to the terms in which it is reserved, the validity of the trust remains unaffected. 28 A. & E. Enc. (2 Ed.), 900, 950; *Stone v. Hackett,* 78 Mass., 227; *Kelley v. Show,* 185 Mass., 288; 1 Beach Trusts, sec. 81, and cases cited. The trust was not revoked and the defendant should proceed to execute it.

No Error.

THORNTON v. HARRIS.

(Filed March 13, 1906).

Churches—Trustees—Vacancies—Deeds—Schools.

1. The provisions of Revisal, sections 2670-1, which confer upon any church the right to appoint trustees to hold its property and to fill vacancies, etc., apply only to such property and not to property held in trust for a "Baptist church and for the education of the youths of the colored race."

2. In a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust for the same beneficial owner, the title does not come in controversy.

3. Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," their successors will be appointed under Revisal, section 1037, by the clerk of the court.

4. Where a deed conveyed property "in trust for purposes of a school house for the education of freedmen and children irrespective of race," a lease of the property by the trustees for 200 years "to be used as a Baptist church and for the education of the youths of the colored race," is wholly unauthorized and in violation of the power conferred by the deed.

ACTION by M. F. Thornton and others against Jno. W. Harris and others, heard by *Judge B. F. Long* and a jury, at the September Term, 1905, of the Superior Court of WARREN. From a judgment for the plaintiffs, the defendants appealed.

Tasker Polk and *Pittman & Kerr* for the plaintiffs.
Walter A. Montgomery for the defendants.

CLARK, C. J. On 11 March, 1870, S. P. Arrington conveyed to trustees named in the deed a certain lot in Warrenton "in trust, nevertheless, for the purposes of a site for a

school house to be used for the education of freedmen and children irrespective of race or color." On 9 September, 1874, a majority of the trustees named in the aforesaid deed executed a lease of said premises for 200 years to Lem Thornton and six others, as trustees, in consideration of twenty dollars, ten dollars thereof payable at the end of 100 years and the other ten dollars to be paid at the termination of lease, the rent to be "applied to school purposes" and the property "to be used as a Baptist church and for the education of the youths of the colored race." The property has ever since been so used. The three surviving trustees named in the deed of 1874 have filled the four vacancies caused by death, and these seven are the plaintiffs. The Baptist congregation (colored) which has been using the premises, in March, 1905, filled the four vacancies by an election by the congregation, and took possession of the property, and on 17 April, 1905, the congregation removed the three surviving trustees named in the lease of 1870, and elected three others in their stead. The seven trustees thus elected by the congregation are the defendants. The defendants claim the right of the congregation to thus fill vacancies and remove trustees at will under authority of Revisal, sections 2670, 2671, which confer upon any church the right to appoint trustees to hold its property, and to fill vacancies and remove trustees at will. The plaintiffs contend that such provisions apply only to church property and not to property held in trust "for the Baptist church and for the education of the youths of the colored race," and that for such purposes, it being not exclusively church property, the trustees appointed in the conveyance of 1874 should hold the property. This was correctly so held by His Honor.

It is true that in an action of ejectment the plaintiff must recover upon the strength of his own title. But, here, the title does not come into controversy. As was said in the similar case of *Simmons v. Allison,* 118 N. C., 767: "The nature of an action is not determined by the prayer, but by

the body of the complaint. * * * There is no element of the action of ejectment in this case, neither in fact nor technically." The beneficial owner and occupant, the congregation and the school, are the same, whether the plaintiffs are the rightful trustees or the defendants. The title is the same. The defendants have no title whatever, unless as substituted trustees they are entitled to take the place of the plaintiffs. The law, brushing aside technicalities, looks to the substance. Upon the facts alleged and proved, this is simply nothing more than a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust for the same beneficial owners. We adjudge that the defendants have no claim, it not being a trust purely for the church. The three plaintiffs, who were on the original board, are entitled to execute their trust—as against these defendants—and to the process of the court to be restored to their functions. Upon the death of the last survivor, their successors will be appointed by the clerk of the court. Revisal, section 1037.

But it may well be inquired into, upon proper proceedings and by the proper parties, whether the plaintiffs have any claim to hold the possession, upon their own showing, except against mere trespassers. The deed of 1870 conveyed the property "in trust for purposes of a school house for the education of freedmen and children irrespective of race." The lease of 1874 of the property for 200 years (at a rental of ten dollars, payable respectively one hundred and two hundred years after date) "to be used as a Baptist church and for the education of the youths of the colored race," is wholly unauthorized, and in violation of the power conferred by the deed of 1870. What effect, if any, the statute of limitations will have, and who are entitled to bring proceedings to enforce the trust, we need not now decide.

No Error.

CHADBOURN v. DURHAM.

(Filed March 13, 1906).

Judgment—Sureties.

Where the solvent sureties paid the amount due on a judgment against the principal and the sureties and caused the same to be assigned for their benefit, and the plaintiff was designated as agent to collect what he could from the insolvent sureties, and as such agent held the balance due on the judgment and in pursuance of this arrangement, took from the defendant, an insolvent surety, a note and mortgage which was to be in full payment of his liability on said judgment, *held*, that a judgment for the full amount of the note was proper, the *pro rata* due from the defendant being more than the amount of the note.

ACTION by W. H. Chadbourn against R. I. Durham and wife, M. Della Durham, to foreclose a mortgage, heard by *Judge M. H. Justice* and a jury, at the January Term, 1905, of the Superior Court of PENDER. From a judgment for the plaintiff, the defendants appealed.

E. K. Bryan and *J. T. Bland* for the plaintiff.

J. D. Kerr and *Stevens, Beasley & Weeks* for the defendants.

HOKE, J. The plaintiff and defendants and some others were sureties on the bond of E. M. Johnston, ex-sheriff of Pender County. Said Johnston, having failed to account properly for county funds, judgment was rendered against him and his sureties for $5,075.85. The property of said Johnston was sold to satisfy said judgment, and several thousand dollars was realized from said sale, leaving a balance due. The solvent sureties, the plaintiff being among them, paid the amount due to the county on said judgment and caused the same to be assigned for their benefit and protection. The plaintiff was designated as agent to collect what

he could on the respective amounts due by the insolvent sureties, and, as such agent, holds and controls the balance due on the judgment against Johnston and others. In pursuance of this arrangement, the plaintiff took from the defendant, who was an insolvent surety, the note for $150, secured by the mortgages sued on. Both the plaintiff and the defendant testified that the same was given by Durham in payment of the amount due from him on the judgment aforesaid, and that it was to be in full payment and discharge of any and all liabilities of said Durham on the judgments. It was found that the *pro rata* due from the defendant was more than the amount of the note.

On these facts, the court correctly instructed the jury that if they believed the evidence, they would render a verdict for the full amount of the note and interest. The jury so rendered the verdict, and judgment was thereupon rendered for the plaintiff.

There is no error. The note was given by Durham in payment of the *pro rata* amount due from him on the judgment, and was to protect him from further liability. The plaintiff is in a position to comply with the agreement and the judgment of foreclosure is affirmed. Both the plaintiff and the defendant having testified that on payment of the note and interest Durham would be relieved of any and all liability by reason of the judgment, the final decree should be so drawn as to afford him protection in accordance with this stipulation.

Affirmed.

MACHINE CO. v. OWINGS.

(Filed March 13, 1906).

Election of Remedies — Action for Fraud — Action on Notes—Estoppel.

1. An action by the plaintiff on the notes of the defendant for the purchase price of certain machines, pursued to judgment and uncollected, is not a bar to an action to recover damages for fraud and deceit on the part of the defendant in procuring the sale.

2. The doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other, but the principle does not apply to co-existing and consistent remedies.

ACTION by the Standard Sewing Machine Co. against D. A. Owings, heard by *Judge E. B. Jones,* at the October Term, 1905, of the Superior Court of CRAVEN.

The plaintiff, holding notes of defendant for the purchase price of certain machines, had instituted two actions on same against defendant, and said actions having been consolidated, plaintiff obtained judgment on said notes against defendant at May Term, 1905, of Craven Superior Court. Defendant, having filed his petition in bankruptcy, obtained an order from the District Court, staying further proceedings in that cause in enforcement of said judgment. Thereupon plaintiff, on July 29, 1905, instituted this action to recover damages for fraud and deceit on part of defendant, by which plaintiff had been induced to sell defendant said machines; and on this action an order for arrest was issued and defendant gave bond as required by the statute.

This last cause, coming on to be heard at October Term, 1905, on motion, the order of arrest was discharged and the surety on the bail bond relieved of all responsibility on same, the court holding that the prosecution of the action on the

notes and obtaining judgment thereon was a bar to any action for fraud and deceit in procuring the sale of the machines. Plaintiff excepted and appealed.

Simmons & Ward for the plaintiff.
Ernest M. Green for the defendant.

HOKE, J., after stating the case: No reason occurs to us why a suit by plaintiff on the contract, pursued to judgment, uncollected and apparently uncollectible, should bar an action to recover damages for fraud and deceit on the part of defendant, and by means of which the sale was procured. Both actions are consistent in theory, and both in affirmance of the sale. The remedies, in this jurisdiction at least, while consistent, are not always entirely co-extensive, nor are the damages necessarily the same. The weight of authority is also against the position of defendant.

In Enc. Pl. & Practice, vol. 7, 362, the doctrine is stated as follows: "As already stated, the principle does not apply to all co-existent remedies. As regards what have been termed consistent remedies, the suitor may, without let or hindrance from any rule of law, use one or all in a given case. He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final, and, if not satisfied with the result of that, he may commence and carry through the prosecution of another. Thus, where a sale of chattels is induced by the fraud of the vendee, the vendor may prosecute the vendee for the price of the articles in one action, and in another for damages on account of the fraud; both proceeding on the theory of ratifying the sale. But he cannot maintain either if he has rescinded the sale, or if, on the theory of rescission, he has resorted to replevin to recover the property. No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress upon one and the same line of facts."

In 3 Words and Phrases Judicially Defined, p. 2338, it is said: "The whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to co-existing and consistent remedies." These statements of the doctrine are supported by well considered decisions, and are very generally accepted as correct. *Whittier v. Collins,* 15 R. I., 90; *Bacon v. Moody,* 117 Ga., 207; *Austen v. Decker,* 109 Iowa, 109; *Black v. Miller,* 75 Mich., 323.

We are referred by defendant to *Palmer v. Preston,* 45 Vt., 154, and *Cuylas v. Railroad,* 76 N. Y., 609, as cases sustaining his position. While the language of the court in these two opinions certainly tends to support the defendant's claim, we doubt if either is an authority in his favor. As decisions, both might very well be distinguished on grounds not inconsistent with our present opinion. If, however, the construction put upon these cases by the defendant be the true one, we hold that they are not in this respect well considered, and that the better doctrine is to the contrary, as heretofore stated.

There was error in discharging the order of arrest and relieving the surety on the bail bond. The same will be set aside and the cause remanded to be proceeded with in accordance with the law.

Error.

FISHER v. NEW BERN.

(Filed March 13, 1906).

Cities and Towns — Electric Plant — Commission — Negligence—Corporate Liability.

1. Where the charter of the defendant city authorized it to operate an electric light plant for the purpose of furnishing lights to the inhabitants of the city and to charge for the use of said lights when furnished to private consumers, the city is responsible for the negligence of the commission established by chapter 41, Private Laws 1903, for the management and control of the plant.

2. Cities and towns, when acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, are liable to persons injured by the negligence of their servants, agents and officers; and it is immaterial whether such servant, agent or officer be a corporation or an individual.

3. Where powers are granted to cities and towns for public purposes, exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hac* is to be regarded as a private company.

4. Where a live electric wire had broken and fallen down in the street, winding it up in a coil and hanging it up on an electric light pole about five and a half or six feet from the ground, in the portion of a city frequented by many people and permitting it to remain suspended for two days, is evidence of negligence.

5. The duty imposed upon persons and corporations maintaining wires charged with electricity, upon the public streets and highways, to exercise a high degree of care for the protection of persons using such highways is imperative.

ACTION by John H. Fisher, Administrator of Boss Cobb,

deceased, against City of New Bern, heard by *Judge H. R. Bryan* and a jury, at the November Term, 1905, of the Superior Court of CRAVEN.

This was a civil action for damages alleged to have been sustained by the plaintiff by reason of the death of his intestate, caused by the negligence of the defendant. The testimony, which upon demurrer must be taken as true, showed that the defendant is a municipal corporation, having the usual powers and duties conferred and imposed upon cities and towns in this State. Section 54, chapter 82, Private Laws 1899, entitled "An Act to Incorporate the City of New Bern," provides "that the board of aldermen are authorized and empowered to construct or buy, maintain and operate an electric plant for the purpose of furnishing light to the inhabitants of said city, water works system and sewerage system, and the said board of aldermen are authorized and empowered to charge reasonable prices for the use of said light, water and sewerage, when furnished to private consumers." Section 55 empowers the city to issue bonds when the proposition to do so has been approved by the qualified voters, for the purpose of buying or erecting a system of light and water, etc. Pursuant to the power vested in the board of aldermen by this act, they purchased a water and sewerage plant and erected an electric light plant. The charter was amended by chapter 41, Private Laws 1903, and the sections of this statute pertinent to the questions presented by this appeal, provide that, for the proper management of the water, sewer and electric light systems, a commission is established. The members of the commission are named in the act and their terms prescribed. At the expiration of such terms, their successors are to be elected in the manner provided for the election of the mayor of the city. The commission is given entire supervision and control of the maintenance, management, etc., of said systems, with power to fix

rates for light, water and sewerage, subject to an appeal to the board of aldermen. Provision is made for paying the expenses of maintaining and operating the systems, and payment of interest on the bonds from rates, etc., and the surplus is directed to be held for a sinking fund to discharge the principal of the bonds when due. The commission is required to make quarterly reports to the mayor and board of aldermen of receipts and disbursements, and is given power to employ servants and agents to operate the systems, and to discharge them, etc.

The commission appointed by the Act of 1903 were in control of the electric light plant when the plaintiff's intestate received the injury from which he died. The plaintiff's evidence showed that on the night of March 22, 1904, the electric wire on Queen street was down at Five Points, at the police round house. The wire was broken by an engine. The chief of police who saw the wire down, telephoned for the electrician employed by the commission, whose duty it was to put up wires and attend to the line. When the electrician came to the place at which the wire was down, he said that the wire was not dangerous; that it could wait until morning. He wound up the wire in a coil and tied it with one end of the wire so that it would not come undone. He hung it up on the electric light pole, at the corner of Rountree street, as high as he could reach, about five and a half or six feet from the ground. It did not seem to be a live wire. It was the wire to a lamp. The chief of police also telephoned to the mayor about the wire, who directed him to see the railroad agent about it—said he had nothing to do with it. Large numbers of people generally congregate at the place where the wire was down. When the chief of police found the wire in the street, the current was on it. The electrician said that it was not a live wire and there was no danger in it. It supplied a 16-candle power light. The same wire which was run in all houses. Two nights after the wire

was broken, the deceased, walking along the sidewalk, stepped on it and was killed. It was raining. There was some controversy in respect to the appearance of the body of the deceased after death. The defendant interposed a demurrer to the evidence, which was overruled. Verdict for plaintiff, judgment, and appeal by defendant.

W. W. Clark for the plaintiff.
W. D. McIver for the defendant.

CONNOR, J., after stating the case: The defendant's principal contention is presented by its exception to the following instruction: "Chapter 41, Private Laws 1903, does not create the water and light commission into a separate corporation. The act makes the commission officers and agents of the city of New Bern, and if the jury find that the commisison was negligent, the city would be responsible for such negligence." His Honor correctly construed the statute and drew the proper conclusion in regard to the relation established between the commission and the defendant. The Act of 1903, read in connection with sections 54 and 55, chapter 82, Private Laws 1899, simply establishes a new and separate agency for the management and control of the water, sewerage and light systems. The vice in the defendant's contention lies in the assumption that the board of aldermen constitute the municipal corporation. It is no more the political entity created by the charter than the Legislature is the political entity called the State. Both are mere governmental agencies, established for enabling the people to declare and enforce their sovereign will and purpose. It is entirely immaterial whether the commission is responsible to or under the control of the board of aldermen. Both are responsible to the municipality, which, for the dual purpose of local self-government and performing such other and appropriate powers as are conferred by the charter, is created by the Legislature under the

provisions of the Constitution, Article 8, section 4. If the Legislature had made the commission a corporation, the result would have been the same. It is competent and not unusual for municipal corporations, for convenience in carrying on their varied functions, to use commissions, made bodies corporate; when done, the corporation is a mere agency employed by the municipality with the power of visitation and control in the same manner as if an individual was employed. Such corporations occupy similar relations to the municipality, as the University, the hospitals and the State prison do to the State. They are governmental agencies. Their liability to be sued depends upon the purpose for which they are created. When they are simply agencies of the State, such as counties, they may not be sued for torts committed by the agents, as held in *White v. Commissioners*, 90 N. C., 437, and many other cases. If, as in cities and towns, they have both governmental and business corporate powers conferred, their liability to suits for the torts of their servants and agents depends upon the sphere of activity in which the wrong complained of is committed. In so far as a municipal corporation is engaged in the discharge of powers and duties imposed upon it by the Legislature as governmental agencies of the State, they are not liable for breach of duty by their officers; in that respect, the officers are the agents of the State, although selected by the municipality. When acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, they are liable to an action to persons injured by the negligence of their servants, agents and officers; and it is immaterial whether such servant, agent or officer be a corporation or an individual. *Moffitt v. Asheville*, 103 N. C., 237, in which the authorities are cited and reviewed by *Mr. Justice Avery*; *Willis v. New Bern*, 118 N. C., 137. "The distinction is between the exercise of its legislative powers, which it

holds for public purposes and as a part of the government of the country, and those private franchises which belong to it as a creation of the law. Within the sphere of the former, it enjoys the exemption of the government from responsibilities for its own acts and for the acts of those who are independent corporate officers, deriving their rights and duties from the sovereign power." *McIlhenney v. Wilmington,* 127 N. C., 146; Ingersoll on Pub. Corp., 415; *Maximillion v. Mayer,* 62 N. Y., 160; 1 Smith Mun. Corps., sec. 807.

While it must be taken that one of the purposes of the defendant in erecting a system of electric lights was the illumination of its streets, it is equally manifest that in addition to such purpose, was that of selling power to its citizens for their private residences and stores. Section 54, chapter 82, Laws 1899, expressly confers this power, and the amendment of 1903, chapter 41, in no way limits it.

Without expressing any opinion upon the suggestion that the lighting its streets is a governmental function, if that was the sole purpose for which its plant was erected and was being operated, it would seem clear that as the portion of its charter referring to an electric plant gives it the right to generate and sell power, we must conclude that it was exercising this right. *Nelson, C. J.,* in *Bailey v. The Mayor,* 3 Hill, 531, discussing the question, says: "As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in my mind and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the Legislature in conferring them. If

granted for public purposes, exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hac* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." In that case, the plaintiff sued for the negligent construction of a dam across the Croton river by the agents of the city. The work was done under the control of commissioners, appointed by the Legislature. The same argument was made as in this appeal. The court said in response thereto that the city was under no obligation to accept the charter or amendments, but, having done so, it was bound for the acts of a commission appointed by the Legislature. That case has been uniformly followed by the courts of New York and other States. In *Chicago v. Selz*, 202 Ill., 545, it is said: "The injury to the plaintiff did not arise from negligence in the use of its hydrant for the purpose of extinguishing fire. The business of selling water to inhabitants and street sprinkling contractors is not an exercise of the police power, and the city is not exempt from liability for negligence in maintaining such a system."

The conclusion is irresistible that the commission was the agent of the city, and that upon the maxim *respondeat superior*, it must answer for any injury sustained by its negligence.

In respect to the merits of the case, His Honor properly instructed the jury that "negligence is the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury." It hardly admits of argument that hanging a live wire on a pole, in the manner testified to by all of the witnesses, in the portion of a city frequented by many persons,

and permitting it to remain suspended for two days, in the place and under the circumstances testified to, is evidence of negligence. We see no reason to modify the language of *Cook, J.*, in *Mitchell v. Electric Co.*, 129 N. C., 166. The duty imposed upon persons and corporations maintaining wires charged with electricity, upon the public streets and highways, to exercise a high degree of care for the protection of persons using such highways, is imperative. The defendant insists that the wire, with which the plaintiff's intestate came in contact, causing his death, was charged with a current of only 110 voltage, and could not produce death. The evidence shows that, notwithstanding the theory of the electrician, it did cause death. He was mistaken either in the voltage or its effect upon a human body. The man either touched it, as contended by the defendant, or stepped on it, as contended by the plaintiff and as found by the jury, and was instantly killed.

Persons controlling so dangerous and subtle an agency as electricity must not be permitted to theorize in regard to its probable effects, or speculate upon the chances of results affecting human life. The wires must be either insulated or placed beyond the danger line of contact with human beings, using the public streets in a lawful way. While the testimony regarding the manner in which the contact was brought about is conflicting, the jury have, upon a fair and impartial instruction, accepted the plaintiff's view. The question of contributory negligence was properly submitted. We find no error in the rule laid down in regard to the measure of damages.

The judgment must be

Affirmed.

GRIFFIN v. LUMBER CO.

(Filed March 13, 1906).

Contracts — Deceit — Fraud — Deeds — Damages — Market Value—Instructions—Harmless Error.

1. Where the parties made a contract for the sale of certain timber, reserving a well defined class of trees, and defendant undertook to reduce the contract to writing, in accordance with its terms, but knowingly included the reserved timber and falsely represented to plaintiff that said timber was reserved in the deed, and by means of this false representation, procured the execution of the deed, the plaintiff has a cause of action for deceit, and this is not dependent upon the removal of the timber.

2. Where a party signs the paper-writing which he intended, but is induced to do so by means of some false representation, this is fraud in the representation or treaty, and not in the *factum*.

3. Before signing a deed the grantor should read it, or, if unable to do so, should require it to be read to him, and his failure to do so, in the absence of any fraud or false representation as to its contents, is negligence, for the result of which the law affords no redress, but when fraud or any device is resorted to by the grantee which prevents the reading, or having read, the deed, the rule is different.

4. One who chooses to make positive assertions without warrant, shall not excuse himself by saying that the other party need not have relied upon him. He must show that his representation was not in fact relied upon.

5. In an action for deceit in falsely securing the execution of a deed, conveying timber which was reserved, where the defendant requested the court to instruct the jury that the extent of his liability was the "market" value of the timber at the date of the deed, there was no error committed in giving the instruction with the word "market" stricken out, the court saying, that while the market value should be considered as evidence of its value, it should not control—the question was what was its real value.

6. Where the court instructed the jury that the burden was upon the plaintiff to show the alleged fraud by testimony clear, cogent and convincing, and in concluding the charge, said: "The burden of all the issues is on the plaintiff and the jury cannot find any one in their favor unless upon the greater weight of the testimony," the last remark, considered in the light of the charge given in the beginning, could not have misled the jury.

ACTION by John D. Griffin and another against the Roanoke Railroad and Lumber Company, heard by *Charles M. Cooke* and a jury, at the December Term, 1905, of the Superior Court of MARTIN.

Plaintiffs alleged that on the first day of November, 1899, they made a parol agreement with defendant company to sell to it all of the timber on their land measuring twelve inches at the stump when cut, except the long leaf pine, which was expressly reserved. Defendant's agent, with whom the agreement was made, proposed that he would prepare the deed to which plaintiffs assented. Thereafter said agent presented to them for execution, a deed which he stated was drawn in accordance with said agreement. Plaintiffs were unable to read the deed and requested the said agent to do so. After reading a few lines he said that he did not have time to read the remainder, but assured plaintiff that it was drawn in accordance with their agreement and that the long leaf pine was reserved. Relying upon said representation, plaintiffs executed the deed. Plaintiffs thereafter learned the long leaf pine timber was not reserved from the operation of the said deed; that the representation made by defendant's agent that said timber was reserved was false and fraudulent. That thereafter the defendant sold and conveyed the said timber, including the long leaf pine, to the Dennis Simmons Lumber Company for value and without notice of the fraud which had been practiced upon plaintiffs. That by reason of the conveyance of said timber to said lumber company, plaintiffs have no remedy against said purchaser to

have correction of said deed. That the value of the long leaf pine timber was $221. Defendant denied the material allegations, admitting the sale to the Dennis Simmons Lumber Co. It was conceded that no portion of the timber was cut from the land when the summons in this action was issued. His Honor permitted the plaintiffs to amend their complaint by alleging that the timber had been cut since the date of the summons. Defendant excepted. The court submitted issues directed to the inquiry whether there was an agreement that the long leaf pine was reserved; whether the plaintiffs were induced to execute the deed by the false and fraudulent representations of the defendant's agent and the value of the long leaf pine timber. The jury responded to the issues affirmatively and fixed the value of the timber at $221. Judgment was signed for plaintiffs, to which defendant excepted and appealed.

H. W. Stubbs for the plaintiffs.
A. O. Gaylord for the defendant.

CONNOR, J., after stating the case: The record discloses a number of exceptions. The substantial merits of the controversy group themselves around three questions, all of which are properly raised upon the record and argued by counsel, orally and in his well considered brief. At the close of the entire evidence, defendant demurred and moved for judgment as of nonsuit pursuant to the statute. The first cause of demurrer is: "Because no entry had been made by defendant or the Dennis Simmons Lumber Company and no timber had been cut by either, nor by anyone under their authority when the action was brought." Defendant maintains that no action can be maintained for injury to real estate, unless prior to the date of the writ, a trespass has been committed. This is undoubtedly true and if plaintiffs' action was for trespass, His Honor would have granted the motion for judg-

ment of nonsuit. The plaintiffs' cause of action is for deceit, in that they have sustained an actionable wrong by false and fraudulent representation of defendant's agent. The motion to nonsuit being founded upon the admission that the transaction is correctly stated in the complaint as testified to by plaintiffs, we may examine the proposition maintained by defendant from that point of view. The parties made a contract for the sale of certain timber, reserving a well defined class of trees. Defendant's agent undertook to reduce the contract to writing, in accordance with its terms. He knowingly included the timber which was reserved and falsely represented to plaintiffs that said timber was reserved in the deed. By means of this false representation, he procured the execution of the deed. It would seem clear, both upon reason and authority, that by this conduct a right of action accrued to plaintiffs. If the matter had remained in this condition plaintiff could have brought an action in the nature of a bill in equity for correction of the deed or sued, as in trespass on the case, for deceit. The case of *Pasley v. Freeman,* 3 Tenn. Rep., 51 (2 Smith L. C., 1300,) settled the principle that "A false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit." *Kent, C. J.,* in *Upton v. Vail,* 6 Johns., 181, after expressing his approval of the doctrine announced in *Pasley v. Freeman,* said: "The case went not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence." It has been the accepted law in American jurisprudence and was discussed and adopted by this court in an opinion containing a "mine of learning" by *Judge Battle,* in *March v. Wilson,* 44 N. C., 144. After an exhaustive review of the English and American authorities, the learned justice con-

cludes: "The principle upon which they were decided is—that where there was fraud by the defendant, either in word or deed, resulting in damage to the plaintiff, he might sustain an action on the case for such damage." Whatever doubt may have existed in regard to the right to maintain an action for deceit relating to contracts for the sale of land respecting acreage, title, etc., is removed by the decision in *Walsh v. Hall,* 66 N. C., 233. *Dick, J.,* after noting the general rule of *caveat emptor,* says: "But in cases of positive fraud a different rule applies. * * * The law does not require a prudent man to deal with every one as a rascal, and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. * * * If representations are made by one party to a trade which may be reasonably relied upon by the other party—and they constitute a material inducement to the contract—and such representations are false within the knowledge of the party making them, and they cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice. In our courts the injured party may bring a civil action in the nature of an action on the case for deceit, and recover the damages which he has sustained; and if the remedy will not afford adequate relief he may invoke the equitable jurisdiction of the court to rescind the contract." The learned justice concedes that in saying that the injured party who had been induced by false and fraudulent representation to take a deed for a tract of land to which the grantor had no title, could maintain an action for damages "seems to be in conflict with previous decisions of this court," citing *Lytle v. Bird,* 48 N. C., 222; *Credle v. Swindell,* 63 N. C., 305. *Bynum, J.,* in *Hill v. Brower,* 76 N. C., 124, says, "The maxim of *caveat emptor* does not apply in cases where there is actual fraud." In that case the fraud consisted in a false and fraudulent represen-

tation in regard to the number of acres in a tract of land. *Knight v. Houghtalling,* 85 N. C., 17; Pollock on Torts, 272; Jaggard on Torts, 570. We think it clear that the plaintiffs, upon the facts testified to by them, had a cause of action for the fraud practiced by defendant's agent. This right is not dependent upon the removal of the timber. The plaintiff's case is very much strengthened by the fact that defendant company has reaped the fruits of the fraud of its agent by selling the timber to the Dennis Simmons Lumber Company, without notice of plaintiff's right to have correction of the deed. Defendant, however, insists that the fraud practiced by its agent in procuring the execution of the deed was in the *factum*, and not in the treaty. That the deed was absolutely void—was not the act and deed of plaintiffs and its vendee acquired no title to the long leaf pine. It is true that the courts recognize the distinction between the two classes of fraud. It is possible that if defendant's contention was correct, the measure of damages might be different. We are, however, of the opinion that the fraud practiced upon the plaintiffs is in the representation or treaty; the plaintiffs signed the paper-writing which they intended to sign, the fraud consists in the false representation by which such signatures were obtained. The distinction is pointed out by *Battle, J.,* in *McArthur v. Johnson,* 61 N. C., 317, in which he says, "An instance of fraud in the *factum* is when the grantor intends to execute a certain deed, and another is surreptitiously substituted for it." Referring to instances of fraud in the treaty or representation, he says: "In all of them it will be seen that the party knowingly executes the very instrument which he intended, but is induced to do so by means of some fraud in the treaty or some fraudulent representation or pretense." *Shepherd, C. J.,* discussing the question in *Medlin v. Buford,* 115 N. C., 269, says: "A deed made by this species of fraud is said to be void, but it will be found upon examination that this term is indiscriminately used in

connection with any deed which may be avoided either at law or in equity. * * * The distinction between void and voidable deeds becomes highly important in its consequences to third persons, because nothing can be founded upon a deed that is absolutely void, whereas from those which are only voidable, fair titles may flow." The defendant insists that whatever rights or causes of action may have accrued to plaintiffs are forfeited by their failing to require the deed to be read to them. That one of the essential elements of an action for deceit is that the fraud of the defendant was calculated to deceive and reasonably relied upon by plaintiffs. It is elementary learning that common prudence requires that before signing a deed the grantor should read it, or, if unable to do so, should require it to be read to him, and his failure to do so, in the absence of any fraud or false representations as to its contents, is negligence, for the result of which the law affords no redress. *School Committee v. Kesler,* 67 N. C., 443. But when fraud or any device is resorted to by the grantee which prevents the reading, or having read, the deed, the rule is different. *Montgomery, J.,* in *Dellinger v. Gillespie,* 118 N. C., 737, says: "It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it." *Judge Bynum,* in *Hill v. Brower, supra,* says: "The representation of B and his exhibit of the map and plat of the land, and his calculation of the quantity, not only caused the defendant to make no survey, but put to sleep any further inquiry as to the quantity of the land. An actual survey was thus prevented by the artifice and contrivance of the other party." The present condition of the law upon the subject is well stated in Pollock on Torts, 293. "It seems plausible at first sight to contend that a man who does not use obvious means of verifying the representations made to him does not deserve to be compensated for any loss he may

incur by relying on them without inquiry. But the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant; and it is now settled law that one who chooses to make positive assertions without warrant, shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. * * * In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied on, either because the other party knew the truth, or because he relied wholly on his own investigation or because the alleged facts did not influence his action at all. And the burden of proof is on the person who has been proved guilty of material misrepresentation."

While we think that the conduct of defendant's agent when requested to read the deed was well calculated to mislead the plaintiffs and reasonably induce them to accept his positive assertion that the deed was drawn in accordance with the agreement, we note that recent decisions and text writers show a strong tendency to hold that the defense of negligence on the part of the plaintiff is not open to the defendant when sued for his positive fraud. Jaggard says: "The law recognizes, in many circumstances, the right of a man to rely upon the statements of another. * * * There is indeed a strong inclination on the part of courts to hold, without any qualification, that a person guilty of a fraudulent misrepresentation cannot escape the effects of his fault on the ground of the injured party's intelligence." 1 Torts, 595. The Supreme Court of Illinois, in *Linnington v. Strong,* 107 Ill., 295, says: "The doctrine is well settled that, as a rule, a party guilty of fraudulent conduct shall not be allowed to cry 'negligence' as against his own deliberate fraud. Even when parties are dealing at arm's length, if one of them makes to another a positive statement, upon which the other acts (with the knowledge of the party making such statement) in confidence of its truth and such statement *is known*

to be false by the party making it, such conduct is fraudulent, and from it the party guilty of fraud can take no benefit. While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still, as before suggested, there is a certain limitation to this rule, and, as between the original parties to the transaction, we consider that when it appears that one party has been guilty of an intentional and deliberate fraud by which, to his knowledge, the other party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct, by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care." *Kilmer v. Smith,* 77 N. Y., 226. "If a *bona fide* inquiry be made in a proper quarter and a reasonable answer be given, a man may rest satisfied with the information and need not make further inquiry." Kerr on Fraud and Mistake, 256; 1 Big. on Fraud, 528; Fetter's Eq., 136; Biddle on Warranty, section 326. The defendant has raised and discussed these questions upon a demurrer to the evidence and upon requests to instruct the jury. His Honor correctly overruled both motions. The instructions in regard to the essential facts to be found by the jury in answering the issues are in strict accordance with the principles which we find approved by this and other courts. The defendant requested the court to instruct the jury that the extent of its liability, if any, was the market value of the long leaf pines at the date of the deed. The word "market" was stricken out and the instruction given as asked, His Honor saying, that while the market value of the pine should be considered as evidence of their value, it should not control—the question was what was the real value of the long leaf pines as they were standing at the date of the deed. We do not perceive any error in this instruction. There was no evidence that there was any market

in which the value was fixed. The plaintiffs were entitled to the value of their property. His Honor instructed the jury that the burden was upon the plaintiffs to show the alleged fraud by testimony clear, cogent and convincing; that the rule in that respect was the same as in an action to correct the deed. In concluding the charge he said: "The burden of all these issues is on the plaintiffs and the jury cannot find any one in their favor unless upon the greater weight of the testimony." To this, defendant excepted. Without discussing the question whether, in an action of this character, the rule laid down by His Honor is applicable, we do not think that the last remark, considered in the light of the charge given in the beginning could have misled the jury. He had stated clearly and forcibly the rule most favorable to defendant, and nothing in the slightest degree weakening the force of his language had been said until the conclusion. His Honor certainly did not intend to reverse what he had said and we do not think his language could have been so understood by the jury. We have examined the entire record with care and find no error. In the light of the testimony as set forth, it is difficult to see how the jury could have come to any other conclusion. The judgment must be

Affirmed.

BOYLE v. STALLINGS.

(Filed March 13, 1906).

Accounting — Nonsuit—Counterclaim—Findings of Fact.

1. Where the plaintiff asked for an accounting, averring that the defendant was indebted to him and the defendant submitted to an account, averring that the plaintiff owed him a balance, and an account was taken and report made and exceptions filed by plaintiff, the court committed no error in denying a motion for nonsuit.

2. Where the plaintiff asked for an accounting, averring that the defendant was indebted to him and the defendant submitted to an account, averring that the plaintiff owed him a balance, *held*, that the defendant did in substance set up a counterclaim.

3. In cases purely equitable in their nature, if an account has been taken and report made, the plaintiff will not be allowed to suffer judgment of nonsuit.

4. This court has no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them.

ACTION by F. A. Boyle and J. P. Boyle, trading as Boyle Manufacturing Co., against W. L. Stallings and others, heard by *Judge George W. Ward,* at the June Term, 1905, of the Superior Court of MARTIN.

Plaintiffs alleged that during the year 1898 they formed a copartnership with defendants for the purpose of operating a saw mill. Defendants owned the mill and agreed to sell plaintiffs a one-half interest therein for $2,500. Pursuant to said agreement they took charge and control of said mill and operated the same until the latter part of the year 1899. During said time, plaintiffs, with the consent of defendants, and in accordance with the terms of the contract of partnership, made, at their separate expense, valuable improvement and additions to said machinery, one-half of the value of

which should constitute a set-off against the purchase price, etc. They made sundry payments on the one-half interest in the mill in money, lumber, etc.

That, during the latter part of the year 1899, the partnership between the plaintiffs and defendants was dissolved and plaintiffs leased defendants' one-half interest in the mill. Thereafter plaintiffs made sundry payments, and advanced sundry amounts on account of the purchase price of the one-half interest in the mill and made improvements thereon, etc. That by reason of the transactions and dealings had between the parties, a long unsettled account had been created, which should be stated and adjusted. That upon such adjustment it would be found that plaintiffs have paid the purchase money for said mill and, in addition thereto, defendants would owe them $500. That plaintiffs have endeavored to bring defendants to a settlement, but have failed to do so, etc. The plaintiffs ask the court that an account be taken under its direction, etc.

Defendants deny the allegations, but admit that an account should be stated and aver that upon such accounting it will be found that no part of the purchase money for the mill has been paid, and that a balance is due them on account of rents, etc. An order was made upon the complaint and answer referring the cause to three gentlemen selected by the parties with directions to take and state an account of the transactions, etc., and declare the amount due. The referees met and, after hearing testimony, examining the books of the parties, made their report, to which is attached a statement of account covering sixteen pages of the printed record. The plaintiffs filed several exceptions, a number of which are directed to the findings of fact upon the ground that they were not sustained by any evidence. They also excepted for that all of the evidence was not reported. When the cause was first called for trial upon the exceptions, the court remanded it to the referees, with direction to report the evidence with

their conclusions of law and fact. This was done and the cause heard by His Honor, *Judge Ward.* Upon an intimation by the judge that he did not see any error in the report, "but would fully consider the same," the plaintiffs stated that they would withdraw their exceptions and take a nonsuit. Defendants objected. Motion for nonsuit was denied and plaintiffs excepted. The court thereupon took the cause under consideration, overruled the exceptions and confirmed the report. Plaintiffs excepted. Judgment according to report and appeal.

Ward & Grimes for the plaintiffs.
Stubbs, Gilliam & Martin for the defendants.

CONNOR, J., after stating the case: We have examined the record with care and find no error in His Honor's ruling. The plaintiffs insist that as defendants did not set up any counterclaim they were entitled at any time, prior to the final judgment, to submit to a nonsuit. We are of the opinion that while not in express terms, the defendants did in substance set up a counterclaim. Plaintiffs asked for an accounting, averring that upon an account stated it would appear that defendants were indebted to them, etc. Defendants submitted to an account, averring that plaintiffs owed them a balance. Prior to the adoption of The Code, plaintiffs would have filed a bill in equity asking for an account.

By reason of the inadequacy of the machinery of courts of law to deal with long and complicated accounts, courts of equity assumed jurisdiction, especially in winding up partnership dealings. Eaton Eq., 516; Bispham Eq., 505. The rule in courts of equity denied the right to the plaintiff to withdraw his bill after a decree has been made for an account. *Egg v. Deavey,* 11 Beav., 221. After a consent order for a mutual accounting before a commissioner, the complainant cannot dismiss by a common order. *Wyatt v. Sweet,* 48

Mich., 539; *Hall v. McPherson,* 3 Bland. (Md.), 529, in which it is said: "But in this case, there having been a decree to account, each party has been thereby virtually clothed with the rights of an actor." 6 Enc. Pl. & Pr., 847. While the precise question has not been decided by this court, the language of *Merrimon, J.,* in *Bynum v. Powe,* 97 N. C., 376, indicates clearly the view which was entertained. He says: "Under the present method of civil procedure, there is but one form of action and the plaintiff, as indicated above, may, no matter what may be the nature of the cause of action, voluntarily submit to a judgment of nonsuit, except in cases purely equitable in their nature he cannot do so after the rights of the defendant in the course of the action have attached, that he has a right to have settled and concluded in the action. Thus, if an order of reference has been made and the referee has made a report, the correctness of which is conceded by both parties and the case is in condition to be finally disposed of, or if an account has been taken and report made, or a decree has been made under which the defendant has acquired rights, the plaintiff will not be allowed to suffer a judgment of nonsuit." *Gatewood v. Leak,* 99 N. C., 363. The cases cited by the plaintiffs' counsel had no equitable element in them. They were actions formerly cognizable at law and are based upon the well settled rule that, when no counterclaim is pleaded, the plaintiff may at any time, before verdict, submit to a nonsuit. The defendants insist that if this action came within the rule, the plaintiffs may not take a nonsuit, because under section 525, Revisal, the report of the referee in regard to findings of fact "shall have the effect of a special verdict." When filed, the cause is in the same condition in respect to the right to submit to a nonsuit as if the jury had returned a special verdict. There is much force in the suggestion, but, as we have seen, the question does not necessarily arise. His Honor correctly denied the motion.

The other exception which was argued with zeal and force

in this court is that the referees adopted a settlement made between the parties by Mr. Fisher, who it appeared was selected, prior to the bringing of this action, to examine their books. There was some controversy as to the extent, in point of time, which Fisher was authorized to make the settlement. The plaintiffs insist that the referees, instead of adopting Fisher's figures, should have examined the items of account, themselves, and reported the conclusions upon them. There was evidence in respect to Fisher's authority for the examination made by him and the acquiescence of the parties. It appears that he entered upon the books of the parties the result of his work. The defendants' counsel in their argument before us exhibited the books, showing the items upon which Fisher's conclusions were reached, and that they were before and after considered by the referees. It is elementary that we have no power to review the conclusions of fact as found by the referees and sustained by the judge, unless it appears that such findings have no evidence to support them. While the result of the accounting is very different from that anticipated by the plaintiffs, and their able and zealous counsel have presented their views upon us forcibly, we are unable to perceive any error of law, with which alone we are permitted to deal. It is conceded that the referees are honorable, intelligent business men. They appear to have proceeded with intelligence and fairness, and His Honor gave the record careful consideration. The form of the judgment is in accordance with the report and must be

Affirmed.

ISLER v. DIXON.

(Filed March 13, 1906).

Lien for Labor and Material—Judgment—Exemptions.

Where the work done on a house and furnishing the material were all in the same contract, which was entire and indivisible, the contractor is entitled to a lien for the whole amount under the "mechanic's and laborer's lien law," and the judgment is superior to the homestead and personal property exemption.

ACTION by S. H. Isler, Jr., against J. W. Dixon, heard by *Judge W. B. Councill*, upon exceptions to the referee's report, at the August Term, 1905, of the Superior Court of LENOIR. From a judgment for the plaintiff, the defendant appealed.

S. W. Isler for the plaintiff.
T. C. Wooten and *Shepherd & Shepherd* for the defendant.

CLARK, C. J. There is only one exception that requires consideration. The plaintiff erected gutters, down spouts, outlets, etc., for the appellant's house and duly filed his lien. The building of the gutters, down spouts, outlets, etc., and furnishing the material were all in the same contract, which was entire and indivisible. The contractor is entitled to a lien for the whole amount under the "mechanic's and laborer's lien law." Revisal, section 2016. *Broyhill v. Gaither*, 119 N. C., 443, is exactly "on all fours."

The appellant contended that the words in the "bill of particulars" in filing the lien "158 feet gutter at 38c," "283 feet gutter at 20c," etc., showed that the lien was only for material furnished, and hence that the defendant could claim his exemptions. But the "facts found" by the referee and approved by the judge show that the contract and lien were for the gutters, down spouts, outlets, etc., including

both work and material. The judgment is therefore superior to the homestead and personal property exemption. Const., Art. X, sec. 4.

No Error.

MATHIS v. MANUFACTURING CO.

(Filed March 13, 1906).

Negligence—Evidence.

In an action for damages for personal injuries, where the evidence showed that the machine was an ordinary circular saw, which was securely fastened on a table five feet square and worked all right, and that there was nothing requiring special instruction, and that plaintiff was injured by running his hand under the table to clean out the saw dust box, without looking where he put it and could have easily seen the saw whirling under the the table by stooping down and looking, *held*, the court erred in overruling a motion of nonsuit.

ACTION by Clifton Mathis, by his next friend, against Maglolia Manufacturing Co., for damages for personal injuries, heard by *Judge W. B. Councill* and a jury, at the August Term, 1905, of the Superior Court of DUPLIN. From a judgment for the plaintiff, the defendant appealed.

Kerr & Gavin for the plaintiff.

Stevens, Beasley & Weeks and *Shepherd & Shepherd* for the defendant.

BROWN, J. At the conclusion of the evidence defendant moved to nonsuit the plaintiff. The court overruled the motion and defendant excepted. Upon examination of the entire evidence, and viewing it in the aspect most favorable to the plaintiff, we are of opinion that the motion should have been granted.

The plaintiff alleges, and offers evidence tending to prove, that he was at the time of the unfortunate occurrence 18 years of age and a common laborer in defendant's mill; that he was employed in carrying out lumber, and had no knowledge of machinery; that there was a circular saw about 14 inches in diameter operated through a slit in a table five feet square in the mill. About four inches of this saw was above the top of the table and the remainder below. The part of the saw below the table could not be seen from above when the top of the table was down. The top worked on hinges and could be turned back. The saw was run by means of a pulley, connected from the floor. The saw dust was caught in a box under the saw. After plaintiff had been in the mill about two weeks, he was directed by the foreman to operate this saw. The foreman instructed the plaintiff to "keep the saw dust cleaned out from the box, and around the saw clean." Plaintiff states: "I was pulling the dust to me from out of this box, and could not see the saw, thinking the frame was protection, and while pulling it to me, the saw struck the stick and jerked my hand on it." Plaintiff further states that he could have easily seen the saw whirling under the table by stooping down and looking while cleaning out the dust box.

The specific negligence charged in the complaint is the defective character and placing of the saw. We are unable to find any evidence in the record to support this allegation. The evidence shows that the machine was an ordinary cut-off saw used in box factories for cutting off boards. It was securely fastened on a table five feet square, and worked all right so far as the evidence discloses.

The negligence pressed upon our attention in the argument was lack of proper instruction as to how to operate the saw. The evidence does not disclose any sort of complication in the machine or anything requiring special instruction. Nor can we discover from the evidence that any kind of instruction would have prevented the deplorable accident to

plaintiff's hand. The plaintiff was not injured while sawing boards. He was injured, according to his own evidence, by running his hand under the table without looking where he put it. The foreman could not have imparted to plaintiff any further information than he already had. The plaintiff had equal knowledge with the foreman as to the dangers incident to operating the saw, and he had sufficient discretion, so far as age and experience go, to appreciate the peril. The plaintiff knew the danger incident to cleaning out the saw dust box with the circular saw revolving rapidly just above it as well as the foreman could have told him. He knew the saw was there and that it was in rapid motion and highly dangerous. It would have been of no service to the plaintiff to have been told by the foreman to be careful and not come in contact with it. *Kiser v. Barytes Co.*, 131 N. C., 610.

While the accident to plaintiff's hand is to be lamented, we are unable to find in the record any evidence of negligence upon the part of defendant which caused the injury.

New Trial.

MAST v. SAPP.

(Filed March 13, 1906).

Accrual of Cause of Action—Death—Survival of Cause of Action—Executors and Administrators — Heir — Injury and Death Simultaneous—Damages.

1. Where a cause of action for damages to land accrued in the lifetime of the testator or intestate, or in other words, the injury was committed during that time, it survives to his executor or administrator; if it was committed after his death, the right of action would belong to the heir or devisee.

2. When the right of a party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete. The recovery in such a case will embrace all damages resulting from the wrongful act.

3. Where the wall of a city reservoir was undermined and fell, by reason of its faulty construction, on the lot of defendant's intestate and struck her house, the first injury was sustained and the wrong was complete just as soon as the wall fell and struck her house, and her cause of action immediately arose for all ensuing damage of which the injurious act was the efficient cause.

4. If the injury developed in the lifetime of defendant's intestate, who was killed in the house and the damage followed in an unbroken sequence as the direct and proximate result of it, the defendant administrator is entitled to recover the fund paid by the city for the property destroyed belonging to his intestate.

5. In a contest between the heir and the personal representative to determine the rightful claimant to a fund paid by the city for destroying the intestate's house by its reservoir falling and crushing it, the question is not whether the intestate survived the destruction of her property, but whether the injury was committed before or after her death.

6. If the destruction of the house and the death of the intestate occurred at one and the same instant of time, the heir would not be entitled to the fund in dispute.

CLARK, C. J., dissents.

MAST *v.* SAPP.

ACTION by D. P. Mast, Guardian of Fred Burkhart, against H. O. Sapp, Administrator of Angeline Peoples, heard by *Judge C. M. Cooke* and a jury, at the May Term, 1905, of the Superior Court of FORSYTH.

This action was brought to determine the right, as between the parties, to a fund of $865, now in the hands of the defendant by agreement, as stakeholder. The controversy arose on the following facts: Angeline Peoples was the owner of a house standing on her lot immediately north of and twelve feet from a reservoir belonging to and used as a place for the storage of water by the city of Winston. On the 2nd day of November, 1904, the wall of the reservoir, which was 20 feet higher than the house, by reason of some negligent defect in its construction or its condition, gave way and either fell, or by the weight and force of the water was driven, against the house, crushing it and killing the said Angeline Peoples, who, with her husband, a son by a former marriage and a stepson, lived in it. The city paid the sum of $4,500 to the administrator of Angeline Peoples for negligently killing her and also paid to him the said sum of $865, the value of the property destroyed, the latter sum to be held subject to the determination by the court of the proper and rightful claimant thereto. The court submitted to the jury the following issue: "Did the intestate of the defendant survive the destruction of the property described in the pleadings?" which the jury answered in the negative.

The defendant's right to the fund was made to turn upon the survival by Angeline Peoples of the destruction of the property. The testimony, which was that of her neighbors, tended to show that within a very short time after they heard a roaring sound, they went out and discovered that the reservoir had burst, the water had spread over the ground and had rushed into some of the houses. The house of Angeline Peoples had then been crushed as if by the first impact of the wall and the water. They rescued Fred Burkhart,

son of Angeline Peoples, and Walter Peoples, her step-son, and Mr. Peoples, all in the order mentioned, who were more or less injured. They then searched for Mrs. Peoples and found her under the debris, consisting of timbers, brick and mortar, and seated in a chair. She was bleeding at the mouth and nose and apparently dead, "as they discovered no signs of life." The brick found on her seemed to have fallen from the chimney. It was about half an hour after they heard the crash before they found Mrs. Peoples. The house had two rooms, and Mr. and Mrs. Peoples and her son slept in the room at the north end of the house, that is the one farthest from the reservoir, and at the north end of that room.

At the request of the defendant the court gave the following instructions: "1. When the matter at issue is as to whether a person, shown or admitted to be living just before or a short time before the happening of a certain event, continued to live until after the event happened, the presumption is that the person did continue to live until after the happening of the event, and the burden is upon the party who asserts the contrary to show that the death occurred prior to or instantaneously with the happening of the event. 3. If the death of Mrs. Peoples did not occur until after the destruction of the property, though but a moment after, then Mrs. Peoples survived the destruction of the property. 4. The burden is on the plaintiff to show that the death of Mrs. Peoples occurred before or instantaneously with the injury to the real estate, or in other words that she did not survive the destruction of the property. 6. If the death of Mrs. Peoples did not occur until after the destruction of the property, though but a moment after, then Mrs. Peoples survived the destruction of the property and the jury will answer the issue 'yes.'" And the court refused to give the following: "2. There is no evidence to show that the death of Mrs. Peoples took place before the injury occurred to the real estate

and therefore the jury must answer the issue 'yes.' 5. There is no evidence to show that the death of Mrs. Peoples took place before or at the moment when the injury to the real estate occurred." The defendant excepted to the refusal to give instructions numbered 2 and 5.

The court then charged the jury as follows: "If the jury should find from the evidence that the falling of the house crushed the life out of Angeline Peoples, then she did not survive the destruction of the house, and they should answer the issue 'no,' but if they should find that she was wounded by the falling of the house and afterwards died from her wounds, or that she was caught in the ruins and afterwards died from suffocation, then she did survive the destruction of the house and the jury should answer the issue 'yes.'" The defendant excepted. Verdict and judgment for plaintiff. Defendant appealed.

Watson, Buxton & Watson and *E. A. Griffith* for the plaintiff.

Lindsay Patterson, H. R. Starbuck and *F. T. Baldwin* for the defendant.

WALKER, J., after stating the facts: The rule of the common law is that a personal right of action dies with the person, but great changes in this respect have been wrought by legislation and the decisions of the courts, and the maxim has thereby lost much of its vitality. As to pure torts, it still retains its ancient force and vigor, that is as to those torts committed to one's person, feelings or reputation, but it does not now apply to torts committed to the property, personal or real. As to the first kind of property, it was repealed by the act, 4 Edward III, chapter 7, and as to the second, by 3 and 4 William IV, chapter 42. These provisions have been substantially adopted by our Legislature and will be found in the several compilations of our statutes. Revised Stat-

utes, chapter 46, section 37; Revised Code, chapter 46, section 43; Code, sections 1490, 1491 and 1497; Broom's Legal Maxims (8 Am. Ed.), 904, *et seq; Howcott v. Warren,* 29 N. C., 20; *Rippey v. Miller,* 33 N. C., 247; *Butner v. Keelhn,* 51 N. C., 60; Schouler on Executors, sections 279 and 373. But for this radical change in the law, neither the plaintiff nor the defendant would be entitled to the fund in controversy. One of them must have it and which of the two is entitled to the favorable judgment of the court, under the law, is the question before us and is one not entirely free from difficulty. "A right to recover recompense for damages (to land) sustained is a chose in action which, if permitted to survive the person damaged, survives to his executor or administrator. The heir or devisee has no interest in or claim to it, and cannot, therefore, either originally prosecute a suit for it or revive one that has been instituted in the life time of the person injured." *Dobbs v. Gullidge,* 20 N. C., 197. But this presupposes of course that the cause of action accrued in the life time of the testator or intestate, or, in other words, that the injury was committed during that time. If it was committed after his death, the right of action would belong to the heir or devisee. We must therefore inquire in such a case when, in contemplation of law, the injury was done. Where there is a breach of an agreement or the invasion of a right, the law infers some damage. *Bond v. Hilton,* 47 N. C., 149; 1 Sedgwick on Damages (8 Ed.), section 98. The losses thereafter resulting from the injury, at least where they flow from it proximately and in continuous sequence, are considered in aggravation of damages. Hale on Damages, section 32; *Brown v. Manter,* 2 Foster (22 N. H.), 468. The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. This has been expressly decided by this court. *Ridley v. Railroad,* 118 N. C., 996; *Parker v. Railroad,* 119 N. C., 685. "When an injury is permanent, it is what is spoken

of in the books as 'original,' that is as accruing wholly when the wrongful act was done, and is distinguished from an act which is to be regarded as continuing, that is an injury that could and should be terminated and is to be compensated for strictly with reference to the past and upon the theory that it would be terminated." *Bizer v. Railroad,* 70 Iowa, 147. The case is cited with approval, and the language above quoted adopted in *Ridley v. Railroad, supra.* An injury committed is then a permanent one, in the sense above explained, when it is done at once by the unlawful act or the negligent omission from which the loss results without any repetition of the act, there being only one act and one damage, though the latter may be composed of several items or consist, for example, in the destruction of several different pieces of property. The wrong produces one continuous train of consequences. The loss is all traceable back to the single origin and in that case the law awards damages once for all. *Ridley v. Railroad, supra; Beach v. Railroad,* 120 N. C., 498. "The right to recover prospective as well as existing damages in an action, depends usually upon the answer to the test question whether the whole injury results from the original tortious act or from the wrongful continuance of the state of facts produced thereby." *Ridley v. Railroad, supra,* citing *Troy v. Railroad,* 3 Foster (N. H.), 83. In the case of a nuisance or a continuing trespass, from the very nature of the act, the cause of action must be of itself a continuing one; but when there is a single wrongful act, which the law denominates the injury, the continuing damages flowing from the one wrong belong to the party originally injured and are recoverable in one suit; the cause of action and damages are an entirety. *Cook v. Redman,* 44 Mo. App., 397; *Moore v. Love,* 48 N. C., 215. When a cause of action once accrues there is a right, as of the time of the accrual, to all the direct and consequential damages which will ever ensue, that is, all damages not resulting from a continuing fault which

may be the foundation of a new action or of successive actions, and the law will in such a case take into consideration not only damage already suffered, but that which will naturally and probably be produced by the wrongful act, subject of course to another rule as to what prospective damages can be recovered in actions of tort. 1 Sutherland on Damages (3 Ed.), sec. 120; *Beach v. Railroad, supra.* It has been held that, where an attorney brought a suit improperly, the cause of action arose at the time the error was committed, and not at the time the damage was actually sustained, nor at the time it developed and became definite. *Wilson v. Plummer,* 4 Peters, 172; *Smith v. Fox,* 6 Hare, 385; *Howell v. Young,* 5 Barn. & Cres. (11 E. C. L.), 219. So in *Shackleford v. Staton,* 117 N. C., 73, this court held that a cause of action arising against a clerk of the Superior Court, under the statute, for failure to docket a judgment, was complete when the failure first occurred, but the duty to docket was a continuing one during his term, and suit should have been brought within three years after his term expired, and, not having been brought within that time, it was barred, though the actual damage was not suffered by the plaintiff until after the bar of the statute had become effectual. In *Hocutt v. Railroad,* 124 N. C., 219, it is suggested that the cause of action does not accrue until there has been an injury or an actual invasion of the right of the plaintiff and he is in a position to recover his damages. He must at least have the ability to do so, it is said, or otherwise the principle underlying the statute of limitations, and we may add the assessment of damages, would be subversive of common right. These cases may all be reconciled, perhaps, by keeping in mind the true legal definition of an "injury" and by properly heeding the difference between those cases in which permanent damages, past and prospective, may be assessed and those in which only damages already accrued are awarded, either to the date of the writ or to the time of the verdict. The

court in *Wilcox v. Plummer, supra,* draws the line of demarcation between a case where there has been an injury or violation of a legal right and one where there has been consequential damages merely, and in that connection refers to the case of *Gillon v. Boddington,* 1 Car. & P., 541 (11 E. C. L., 463), which is a very instructive one and bears some resemblance, in its general features, or at least in the principles involved, to *Ridley v. Railroad* and *Hocutt v. Railroad, supra.* In the *Gillon case,* the plaintiff owned a remainder in fee in a wharf expectant on an estate for life in his father. The defendants in 1823 dug soil out of their dock near the foundation of the wall of the wharf in such a way that, by the action of the tide, the wall was undermined, and it fell in 1824. The father died in 1823, after the digging of the soil. The court held that the son had a right of action for undermining the wall against the defendants, although they had done no act, which contributed to its destruction, since the death of his father, at which time the plaintiff came into possession of the freehold of the wharf. It will be observed that in the *Gillon case* there was a life estate and a remainder in the property and an injury to the inheritance, but the ground of decision was that the digging near the plaintiff's foundation, which was the primary cause of the subsequent injury, was in itself no violation of a right, and that by possibility the act might have proved harmless, as it would have been, had the wall never fallen, and this reason for the decision is the basis of the distinction between that case and *Wilcox v. Plummer,* as shown by the court in the latter case. When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete. The recovery in such a case will embrace all damages resulting from the wrongful act. The cause of action and the damage are to be deemed inseparable. This principle, as we have shown, does not apply to a case of a nuisance or trespass,

which torts are continuing in their nature, the nuisance of today being a substantive cause of action, and not the same with the nuisance of yesterday, and likewise in the case of a continuing trespass. *Wilcox v. Plummer, supra; Eller v. Railroad,* 140 N. C., 140. If the trespass consists in one single act of wrong and has not in it the element of continuance, the general rule we have stated will apply, for where there is the same reason, there must be the same law. The cases of *Moore v. Love,* 48 N. C., 215; *Shaw v. Etheridge, ibid.,* 300, and *Jones v. Kramer,* 133 N. C., 446, are distinguishable from our case. They belong to a class of their own, and were decided upon the ground that the damage was not of a permanent character, as is illustrated in the case last cited, where the nuisance was abatable. They are manifestly not like a case where the wrongful act is single and the *tortfeasor* has irrevocably done all that he can do, though the unlawful act has not fully spent its force, but as a self-acting agency, once put in motion, continues to cause damage. The wrong itself is an accomplished fact, which its author cannot recall or stop, though its consequences in the way of damage still go on. The case just put is like that we find in *Hughes v. Newsom,* 86 N. C., 424, where it was said that the wrong or default of the sheriff, when once committed, was absolute and complete, and gave an immediate right to sue for all damages resulting therefrom.

Applying these general principles to the facts of our case, we conclude that this is an action for "consequential damage." The negligent construction of the reservoir did not become a technical wrong, until by its natural operation it culminated in the fall of the wall, and the latter is the gravamen of the action, and the specific wrong which produced the damage, for the recovery of which the suit was brought. So long as the city, by its negligence, did no injury to any one else, it was not in a legal sense guilty of any wrong, the maxim of the law, so use your own as not to injure others, not having been

violated. The defective condition of the reservoir was a menace to adjoining property, against which the owners might perhaps have had preventive relief in equity, but no legal right of another was at all infringed until by the process of time, and the gradual operation of the primary cause, the wall was undermined and fell, in consequence of what the city had before that time done or failed to do. *Roberts v. Read,* 16 East, 215. This is what is called in law the "consequential damage," or, more correctly, the consequential injury resulting from the faulty construction of the reservoir, and that is the *causa litis. Hocutt v. Railroad, supra.* But just as soon as the wall fell on the lot of Mrs. Peoples and struck her house, the first injury, as said in *Ridley v. Railroad,* was sustained and her cause of action immediately arose. *Roberts v. Read, supra.* It was not necessary that all of the damage should have been done at that particular instant of time, in order to constitute the wrong, for which she might sue and recover the full damages resulting therefrom. The very moment the wall fell, and surely when it struck the end of the house next to it, there was a wrong committed. It was not then a wrong merely threatened, but one which had begun to be executed. The city was not then legally within its right, but had transcended it and was actually invading the right of another to the peaceful enjoyment of her property, and to the protection of it from injury. Its negligence had ceased to be innocuous. It was a *tort feasor,* and at once became liable for all ensuing damage of which the injurious act was the efficient cause. If the injury developed in the lifetime of the deceased, and the damage followed in unbroken sequence as the direct and proximate result of it, so that "the facts constituted a continuous succession of events, so linked together as to make a natural whole" (*Railway v. Kellog,* 94 U. S., 475), without any intervening and independent act creating new damage or such as was not directly caused by the original wrong, the party to whom the first injury was

done, and consequently the administrator in this case, is entitled to recover all the damage. The injury and the damage are one and indivisible. The distinction between a single act of injury and continuing acts is clearly shown in *Spilman v. Navigation Co.,* 74 N. C., 675. If the wrong started in the lifetime of the deceased, we do not see how it can be said to have occurred after her death. It cannot be divided into parts, for it is an integral whole and so regarded in law. Everything that proceeds from it must have relation to the time of its commencement. In *Powers v. Council Bluffs,* 45 Iowa, 652, it appeared that the city had cut a ditch along the side of the plaintiff's lots and caused his lands to be overflowed, and it was held that the cause of action was complete when the unlawful act was committed, and that all the damages accruing from the original wrong must be included in one action. The idea is that the force of the negligent act is fully spent in producing the damage, without any additional fault of the wrongdoer, as is the case where he continues a nuisance or trespass. The damage is susceptible of immediate estimation, no lapse of time being necessary to develop it. It can be assessed, as is the case of injury from a permanent structure, once for all. The court, in *Powers v. Council Bluffs,* recognizes the distinctions taken and the principles laid down by this court in *Jones v. Kramer, supra,* and *Moore v. Love, supra.* In our case, when the wall of the reservoir was undermined and fell, the wrong was complete, and there is no similitude to a continuing nuisance or trespass for which successive actions will lie. As said in *Fowle v. N. & N. Co.,* 112 Mass., at p. 388: "As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage. There is no exception to this rule in the cases of nuisance, where damages after action brought are held not to be recoverable because every continuance of a nuisance is a new injury, and not merely a new damage. The case at bar is not to be treated strictly in this respect as an action for an

abatable nuisance." *D. C. I. & W. Co. v. Middaugh,* 13 Am. St. Rep., 234. The case of *R. W. Co. v. Tillson,* 69 Me., 268, is a very instructive case on this subject. It is there said that a second action cannot be maintained for damages resulting from a single act, as it is complete and ended, and it is the damage only which continues and is recoverable, because it is traced back to the original act; while in the case of a nuisance it is the act which continues and is renewed day by day. In the case at bar there was not and could not be any repetition of the original wrong after Mrs. Peoples' death, so as to give her heir a cause of action, within the principle of the case just cited, nor indeed was there in fact any damage after her death. It had all occurred in her lifetime or at the very instant she died. It follows from what we have said that the issue was improperly framed. The question was not whether Mrs. Peoples survived the destruction of the property, but whether the injury was committed before or after her death, under the principles which we have attempted to lay down for the guidance of the court. In his complaint, the plaintiff alleges that the destruction of the building and the death of the intestate occurred at one and the same instant of time. If this be true, no part of the injury, if we may use the expression, could have been inflicted after her death, and the title of the plaintiff's ward did not accrue until his mother died. Before that time he had a mere expectancy. Unless the wrong was done after her death, or, what is the same thing in effect, unless it occurred after the title vested in the plaintiff's ward, the latter surely cannot be entitled to the fund in dispute, as he was not in a legal sense injured by the wrong. The plaintiff, in order to make good his claim, must, therefore, show that his ward had already come to his inheritance when the wrong was committed and at its inception as it is not divisible. Otherwise, the mother's personal representative is entitled to the fund to be administered according to law—for either the one or the other must have it.

If the application of the foregoing principles will result in apparent hardship to the plaintiff's ward, we are reminded by Lord Campbell that "Hard cases must not make bad laws," and "we, as judges, cannot be wiser (or more liberal) than the law." It may be that the plaintiff can yet show a better case, but, if he fails, it cannot be attributed to any defect in the law, the rules of which are necessarily of general if not universal application, and not made for particular cases.

There was error in submitting the issue, as it was not sufficient to determine the rights of the parties. *Falkner v. Pilcher,* 137 N. C., 449. The case was not tried upon the right theory. Some of the instructions asked by the defendant to be given to the jury might have been correct and germane, if the issue had been properly framed.

New Trial.

CLARK, C. J., dissenting: If, as the complaint alleges, the destruction of the building and the death of the intestate occurred at one and the same instant of time, there was no moment of time during which the right to recover damages vested in her. Hence, no right to an action therefor could pass to her personal representative. If the same movement of matter and at the same instant swept her and her house out of existence, it swept the title to the realty simultaneously into the heir. The destruction being therefore damage to the realty, which at that same instant of time became the property of the heir, the damage accrued to him. If so, the charge of the court was correct when he told the jury that "if they should find from the evidence that the falling of the house crushed the life out of Angeline Peoples, then she did not survive the destruction of the house, and they should answer the issue 'no.'"

When parent and child perish in the same shipwreck, nothing else appearing, the modern decisions all hold (ignoring former presumptions based upon strength, age, etc.,) that it

not appearing that the title vested for an instant in the child, the property goes to the heir and next of kin of the parent. If the damage to the realty and the death of the mother were simultaneous, by the same reasoning, the right to recover damages is not shown to have vested in her for an instant, and the realty at that same instant devolving upon the heir, the injury is done to his realty and the compensation should go to him.

PARROTT v. RAILROAD.

(Filed March 20, 1906).

Railroads—Ejection—Evidence—Punitive Damages—Withdrawal of Incompetent Evidence—Harmless Error—Custom.

1. In an action to recover damages for wrongful ejection, where the evidence showed that the plaintiff, who was a passenger, was wrongfully put off the defendant's train at night in the country, and that the conductor and brakeman took hold of him and forcibly ejected him in the presence of other passengers, and that the conductor was rude, stern, harsh and humiliating in his demeanor towards plaintiff, the court did not err in submitting the assessment of punitive damages to the jury.

2. Where the evidence, admitted over appellant's objection and afterwards withdrawn from the jury, was so compact and brief and the language of the judge so clear in withdrawing it, that this court is satisfied the jury could not have been misled or unduly influenced against appellant by it, a new trial will not be ordered.

3. Where the defendant was permitted to prove the custom of the conductor in regard to taking up tickets and checking passengers from all stations, the testimony of witnesses that this conductor had on previous occasions called upon each of them for a ticket after it had been surrendered to him, was competent for the purpose of rebutting this custom and showing its fallibility.

PARROTT *v.* RAILROAD.

ACTION by Simon B. Parrott against Atlantic & North Carolina Railroad Co., heard by *Judge W. B. Councill* and a jury, at the December Term, 1905, of the Superior Court of LENOIR. From a judgment for the plaintiff, the defendant appealed.

This is an action to recover damages for a wrongful ejection of the plaintiff from the defendant's train. The following issues were submitted:

1. Did the plaintiff purchase the ticket from the defendant, as alleged in the sixth paragraph of the complaint? Yes.

2. Did the defendant wrongfully eject the plaintiff from its train, as alleged in the complaint? Yes.

3. If so, what actual damages is the plaintiff entitled to recover of defendant? $5.55.

4. Did the defendant wilfully and wantonly or with malice eject said plaintiff from its train, as alleged in the 9th paragraph of the complaint? Yes.

5. If so, what punitive damages is the plaintiff entitled to recover of the defendant? $500."

Loftin & Varser and *G. V. Cowper* for the plaintiff.

N. J. Rouse and *P. M. Pearsall* for the defendant.

BROWN, J. 1. Defendant contends that there is no evidence in the record warranting the imposition of smart money. The jury have found that plaintiff was rightfully a passenger and was wrongfully put off defendant's train at night in the country, some 12 miles from Goldsboro. Under the fourth issue they have found the ejection was wilful and wanton. We find sufficient evidence in plaintiff's own testimony to be submitted to the jury upon that issue. Plaintiff states that the conductor and brakeman took hold of him and forcibly ejected him, that he was in the presence of other passengers and that the conductor was rude, stern, harsh and humiliating in his demeanor towards plaintiff. We think that

the authorities are clear that His Honor, upon the evidence, did not err in submitting the assessment of punitive damages to the discretion of the jury. *Holmes' case,* 94 N. C., 318; *Hutchinson's case,* 140 N. C., 123; *Ammons' case,* 140 N. C., 196.

2. (Exceptions 1, 2, 3, 4 and 5). These five exceptions are all directed to the same class and kind of testimony, and all involve the same principle. His Honor, in overruling the five several objections of defendant, and in admitting the evidence embraced in these five exceptions, permitted the plaintiff to detail to the jury what transpired from the time that he left the train near LaGrange until his return home the next morning, involving a description of an injury to his toe, his fright during the night on the way to Goldsboro, the soiled condition of his face and clothing, and his wandering around Goldsboro during the night. We are inclined to think that this evidence or some of it was competent upon the issue as to actual damages, but as that view was not considered in the argument or briefs, we do not deem it necessary to decide the question. His Honor withdrew the consideration of all of it from the jury in a very clear and distinct manner. In doing so, we do not think His Honor exceeded his authority. When we can see that the appellant has been really injured by such action, we will always order a new trial. In this case the evidence admitted and withdrawn was so compact and brief, and the language of His Honor so clear in withdrawing it, that we are satisfied the jury could not have been misled or unduly influenced against defendant by it. *Crenshaw v. Johnson,* 120 N. C., 270, and *Wilson v. Manufacturing Co.,* 120 N. C., 95, are in point.

The case relied on by defendant (*Gattis v. Kilgo,* 131 N. C., 199), is easily distinguished. The court based its ruling upon the ground that the incompetent evidence pointed out was not a simple error upon the part of the trial judge, which can be corrected at almost any time before verdict; but that, as the court says, "it was a misconception of the theory

on which the case should have been tried," that "the incompetent evidence embraced nearly the whole of the evidence offered to show malice."

3. (Exceptions 6, 7 and 8). These three exceptions arise upon the admission by His Honor of the testimony of witnesses that Capt. Hinnant, the conductor, had on previous occasions called upon each of them for a ticket after it had been surrendered to him. The defendant was permitted to prove the habit or custom of Hinnant, the conductor, in regard to taking up tickets and checking passengers from all stations on the road. The conductor testified: "This custom lets us know where the passenger is going and that we have taken his ticket." It was offered by defendant to show that the conductor could not have overlooked the fact that he had once taken up plaintiff's ticket. The testimony of the witnesses of the plaintiff tended to rebut this custom and to show its fallibility, if it existed, by offering several instances when the same conductor had made the same mistake. "Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt." Wigmore, vol. 1, sec. 92; *Mathias v. O'Neill,* 94 Mo., 527. To rebut this, a negative habit may be shown by evidence, tending to prove that there was no such habit or custom, or that the custom was the contrary. The plaintiff in this case undertook to deny the existence of such an infallible habit or custom by showing specific instances where the habit failed, if there was such a habit. How else could plaintiff contradict it? "That a negative habit may be shown and not merely an affirmative one, seems unquestionable," etc. 1 Wigmore, sec. 376. The only way in which the value of the alleged custom could be judged was by subjecting it to the test of specific instances. The testimony was competent for that purpose. *State v. Railroad,* 58 N. H., 411, and cases cited.

Upon a careful examination of the record, we find no error.

Affirmed.

HUGHES v. KNOTT.

(Filed March 20, 1906).

Sales—Contracts—Readiness to Perform.

1. Where the defendants agreed to deliver a certain quantity of tobacco f. o. b. cars in Raleigh on 1 July, to the plaintiffs, who agreed to receive and pay for it at that time, and neither party was ready to comply on that day, but both were able to comply on 4 July, when the plaintiffs made a demand which was refused and there was no extension of time, plaintiffs are not entitled to recover the tobacco.

2. Neither party to a contract can demand performance by the other without alleging and proving his own readiness to perform his part of the contract at the specified time and place.

ACTION by W. T. Hughes and another against R. H. Knott and others, heard by *Judge C. M. Cooke* and a jury, at the October Term, 1905, of the Superior Court of WAKE. From a judgment for the defendants, the plaintiffs appealed.

Wm. H. Ruffin for the plaintiffs.
Pou & Fuller and *B. M. Gatling* for the defendants.

CLARK, C. J. The defendants agreed to deliver a certain quantity of tobacco f. o. b. cars in Raleigh on 1 July to the plaintiffs, who agreed to receive and pay for it at that time. It appears from the verdict and admissions that neither party was ready to comply on that day, that both were able to comply on 4 July, when the plaintiffs made a demand which was refused and that there had been no extension of time. On 6 July the plaintiffs began this action to recover the tobacco.

It was held when this case was here before, *Hughes v. Knott,* 138 N. C., 109, "neither party can demand performance by the other without alleging and proving his own readiness to perform his part of the agreement" at the specified

time and place. If the defendants had sued the plaintiffs for failing to take and pay for the tobacco on 1 July, the latter could have set up as a defense that these defendants were not able and ready to deliver the tobacco on that day. Indeed the burden would be on them to prove such condition precedent. But the plaintiffs who are suing for the possession of the tobacco, cannot dispense with the prerequisite of showing that they were ready and able to take and pay for the tobacco on 1 July, by showing that if they had been, the defendants were not able to deliver on that day. Both having broken the contract, neither can sue the other for its breach. *Ducker v. Cochrane,* 92 N. C., 597.

The whole matter was so fully discussed on the former appeal, and the principle so clearly stated that the plaintiffs could not recover without showing that they were ready and willing to comply with the contract on 1 July—unless an extension of time was shown—that further discussion now would be "vain repetition."

No Error.

CLAUS v. LEE.

(Filed March 20, 1906).

Verified Account — Prima Facie Case — Delivery — "Immediately"—Reasonable Time.

1. In an action to recover for goods sold and delivered, where a verified statement of the account shows that it is for goods sold by the plaintiff to the defendant and sets out the number and kind of articles, the catalogue numbers, price per dozen and discounts allowed, and there are trade terms and abbreviations well understood in the trade, which show more fully the kind of articles, it is properly itemized to make out a *prima facie* case under Rev., sec. 1625.

2. Where a contract calls for the delivery of goods "immediately," the party is entitled to a reasonable time to deliver them.

3. The question of reasonable time is a mixed question of law and fact, and except where the facts are few, simple and undisputed, and where only one inference can be drawn, or except where the time is so short or so long that the court may declare it reasonable or unreasonable, it should be left to the sound discretion of the jury under the instruction of the court upon the particular circumstances of the case.

ACTION by Claus Shear Co. against Lee Hardware House, heard by *Judge M. H. Justice* and a jury, at the November Term, 1905, of the Superior Court of HARNETT. From a judgment for the plaintiff, the defendant appealed.

This was an action to recover on a bill of goods which plaintiff alleges it sold and delivered to defendant.

Godwin & Davis for the plaintiff.
H. L. Godwin for the defendant.

BROWN, J. 1. In order to make a *prima facie* case, the plaintiff offered in evidence, under the provisions of the statute, Revisal, section 1625, an itemized account of $35.53

duly verified. The defendant objected to it because not properly itemized and not expressed in intelligible terms, and also because it does not show on its face that it is for goods sold and delivered. We think the objections untenable. The statement sets out the number and kind of shears, scissors and razors shipped, the catalogue numbers, price per dozen, and discounts allowed on each. There are trade terms and abbreviations which show more fully the kind of articles shipped. To illustrate, one item is billed as follows: "½ doz. 5½ No. 315 Jap. Tlr Shrs 15—$7.50." It is clear that those are abbreviations well understood in the hardware trade, and mean Japan tailor shears, and that the figures 15 represent the catalogue price, and $7.50 the net price with discounts off. The defendant Lee, who was examined, does not profess to be ignorant of the meaning of the bill. It also appears upon the face of the bill that it is for goods sold by the plaintiff to the defendant.

2. The defendant contends that the oral contract called for a delivery of the goods *immediately,* and that the evidence tended to prove a delay of at least 30 days between the receipt of the order and the shipment, which the defendant contends is an unreasonable delay, and that His Honor erred in leaving the question of "reasonable time" to the jury. There have been numerous cases adjudicating the meaning of the terms "immediately" and "forthwith," etc., as used in contracts, and it is held that such terms are to be construed liberally. Such terms never mean the absolute exclusion of any interval of time, but mean only that no unreasonable length of time shall intervene before performance. 21 Am. & Eng. Enc. (1 Ed.), 535, note 1. Where a covenant requires payment of money immediately, the party is entitled to reasonable time to get it. *Toms v. Wilson,* 116 E. C. L., 455.

Whether the determination of what is a reasonable time is a question of law for the court or of fact for the jury, is a matter upon which there is much conflict of authority. In

our own reports, the case of *Murray v. Smith,* 8 N. C., 42, in the syllabus, declares that "reasonable time means that a party shall do an act as soon as he conveniently can, and it seems the court is to be the judge of that." This syllabus is not fully supported, so far as we can see, by the opinion of the court. The definition of what is reasonable time is taken from the charge of the Superior Court judge to the jury. The charge seems to have been specifically approved by this court, but there is nothing in that opinion, or any other opinions of our eminent and learned predecessors, which holds that reasonable time is essentially a question of law. If there are such, they have not been called to our attention, and they seem to have escaped the lynx-eyed vigilance of our learned *Chief Justice,* who has recently stated that what constitutes reasonable time is a question for the jury. *Blalock v. Clark,* 133 N. C., 308; same case, 137 N. C., 144.

In this apparent conflict between the two cases quoted (and they appear to be about the only cases bearing on the subject) which the diligence of counsel and our own researches have discovered, we have examined somewhat extensively the decisions of other courts and the text writers. The result of our examination leads us to the conclusion that what is "reasonable time" is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not disputed; and the matter should be decided by the jury upon proper instructions on the particular circumstances of each case. *Luckhart v. Ogden,* 30 Colo., 557; *Morrison v. Wells,* 48 Kansas, 494; *Searcy v. Hunter,* 81 Texas, 644; *Furniture Co. v. Board Education,* 58 N. J., 646; *Hill v. Hobart,* 16 Me., 168; *Am. Express Co. v. Ryan,* 104 Ala., 267; *Murrell v. Whiting,* 32 Ala., 55; *Railroad v. Pumphrey,* 59 Md., 390; 2 Mechen on Sales, sec. 1132. This seems to be so decided in England. *Fray v. Hill,* 2 E. C. L., 397; *Doe v. Sandham,* 1 T. R., 705; *Ellis v. Thompson,* 3 M. & W., 445.

The time, however, may be so short or so long that the court will declare it to be reasonable or unreasonable as a matter of law. Whether the question of reasonable time is one of fact or law must "from the very nature of things" depend upon the circumstances of each particular case, as business affairs are so kaleidoscopic in their nature that it is seldom, if ever, that any two transactions are exactly alike.

If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or the circumstances are numerous and complicated, and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them, that the question ever becomes one of law. *Colt v. Owens,* 90 N. Y., 368; *Hodges v. Hudson R. R. Co.,* 49 N. Y., 223; *Pinney v. Railroad,* 19 Minn., 251.

This question frequently arises in contracts for sale and delivery of articles of merchandise where no date is fixed for a delivery. Such was the case of *Ellis v. Thompson, supra.* In the case of *Cockes v. Mfg. Co.,* 3 Sumner, 532, *Mr. Justice Story* on the circuit submitted the question of reasonable time to the jury, and in doing so that learned judge referred with approbation to the rule laid down by *Baron Alderson* in *Ellis v. Thompson.* After stating that what was reasonable time for the delivery of the coal at London was a question for the jury in the absence of a specific date in the contract, that eminent English judge says: "It seems to me the correct mode of ascertaining what reasonable time is in such a case as this, is by placing the court and jury in the same situation as the contracting parties themselves were in at the time they made the contract, that is to say, by placing before the jury all those circumstances which were known to both par-

ties at the time the contract was made and under which the contract itself took place."

The term "reasonable time" is a technical and legal expression which in the abstract involves matter of law as well as fact. Thomas Starkie says: "The law cannot prescribe in general what shall be reasonable time by any defined combination of facts, so much does the question depend upon the situation of the parties and the minute and peculiar circumstances incident to each case." Starkie on Ev., p. 769, 774; 1 Daniel on Neg. Inst., sec. 612; 1 Parsons on Notes and Bills; *Wyman v. Adams,* 12 Cush., 210, 214. There is no rule of law by which the court can speak authoritatively as to what is reasonable time for the delivery of merchandise ordered through a salesman at Dunn, N. C., the order to be filled and shipped from Fremont, Ohio. The time, 30 days, is not on either extreme. Many authorities hold that the time may be so short or so long that the court may as matter of law declare it reasonable or unreasonable, but the same authorities say that where the time falls between these extremes what constitutes a reasonable time is a question to be answered by the jury. *Railway Co. v. Birnie,* 59 Ark., 78, citing many cases. As to who shall decide this question of reasonable time has been much controverted in the courts, but we think the better view that it is a mixed question of law and fact, and that, except where the facts are few, simple and undisputed and where only one inference can be drawn, or except where the time is so short or so long that the court may declare it reasonable or unreasonable, it should be left to the sound discretion of the jury under the instruction of the court upon the particular circumstances of the case. *Bacon v. Harris,* 15 R. I., 603.

We find no error in the record and the judgment is

Affirmed.

WALKER and CONNOR, JJ., concur in result.

ROUSE v. WOOTEN.

(Filed March 20, 1906).

Principal and Surety—Notice of Dishonor—Negotiable Instruments—Primary Liability.

1. A surety on a note is not discharged from liability by reason of the fact that he was not given notice of its dishonor.

2. Under Rev., sec. 2342, the liability of a surety is primary, for he is, by the terms of the instrument, absolutely required to pay the same.

ACTION by N. J. Rouse and another against Shade Wooten, heard by *Judge W. R. Allen* and a jury, at the November Term, 1905, of the Superior Court of LENOIR. From a judgment for the plaintiffs, the defendant appealed.

The action was brought to recover the amount of a note payable to the plaintiff and signed by E. A. Hinson, as principal, and the defendant as surety. The issues submitted to the jury with their answers thereto were as follows: "1. Did the defendant execute the note sued on for value? Ans. Yes. 2. If so, did he execute said note as surety? Ans. Yes. 3. If so, was this fact known to the plaintiff? Ans. Yes. 4. If so, was said note paid at maturity? Ans. No. 5. If so, did plaintiffs give notice to the defendant of the non-payment of said note? Ans. No. 6. If not, did plaintiffs give such notice to defendant thereafter, and if so, when? Ans. In doubt as to time, but about January after maturity of note." The execution of the note was admitted. There was no exception to evidence or to the charge of the court. The defendant moved for judgment upon the verdict, which motion was overruled and he excepted. Plaintiff then moved for judgment; his motion was allowed and judgment entered upon the verdict for him. Defendant excepted and appealed.

Loftin & Varser and *G. V. Cowper* for the plaintiffs.

Wooten & Wooten and *Shepherd & Shepherd* for the defendant.

WALKER, J. The defendant's contention is that he was discharged from liability on the note by reason of the fact that he was not given due notice of its dishonor, and he relies upon section 2239 of the Revisal to sustain his position. It appears from the face of the paper, that it is a note and not a bill, and that defendant was not either a drawer or endorser, who are alone mentioned in that section. The jury in their verdict find that he was simply a surety. His counsel in their brief refer to section 2213 to show that defendant is not primarily liable on the note, but he is not in any sense an endorser, as he is a party to the note, and that section, therefore, has no bearing on the case. We infer from the course of the argument that some reliance was placed on section 2219, dispensing with presentment for payment where it is sought to charge the person primarily liable on a negotiable instrument, the argument deduced therefrom being that presentment is necessary where the party is secondarily liable and that defendant's liability is of that character. While we do not think the question is distinctly presented, as there is nothing in the verdict concerning presentment for payment, it is a matter of general importance and we will therefore consider it.

The negotiable instrument law (chap. 54 of the Revisal), which is an admirable compilation of the principles relating to the subject, clearly points out the well settled distinction between persons primarily liable and those secondarily liable on commercial paper. "The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable." Section 2342. A surety comes squarely within the definition of a person whose liability is

primary, for he is, by the terms of the instrument, absolutely required to pay the same. In *Shaw v. McFarlane,* 23 N. C., 216, it is held that if two persons are bound by a bond or judgment for the payment of a sum of money, the one is liable to the creditor in the same manner and to the same extent as the other, though, as between themselves, they may stand as principal and surety. "In respect to the creditor they are joint debtors fixed with the same obligations, and and what discharges one discharges the other and nothing less." A surety's obligation is thus defined in Brandt on Suretyship & Guaranty (3 Ed.), sec. 2: "A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal." *Mfg. Co. v. Kimmel,* 87 Ind., 566. It is there further said that he is not entitled to presentment or to notice of dishonor, and that he is in the first instance answerable for the debt for which he makes himself responsible and is directly and equally bound with his principal and must take notice of his default. *Neal v. Freeman,* 85 N. C., 441. The court, by *Ashe, J.,* in *Williams v. Glenn,* 92 N. C., 255, said: "As between the makers of a promissory note and the holder, all are alike liable and all are principals," citing *Robinson v. Lyle,* 10 Barbour (N. Y.), 512. The court then proceeds to say that, as between themselves, the true relation of the parties as principal and surety may be shown and their rights depend upon principles other than those stated. The distinction between a primary and secondary liability is well stated and illustrated in *Coleman v. Fuller,* 105 N. C., 328, where it is said that a surety is bound with his principal as an original promisor, but the contract of a guarantor is his own separate contract and a warranty that what is promised by the principal shall be done and not merely an engagement jointly with the principal to do the thing. "The surety's promise is to pay

a debt, which becomes his own when the principal fails to pay it." To the same effect are the cases of *Woody v. Haworth,* 57 N. E. Rep., 272, and *Nading v. McGregor,* 6 L. R. A., 686. So in *Bell v. Howerton,* 111 N. C., 70, the court declared the principle to be that "the duty of performing the contract, or seeing that it is performed, is on the surety, and that he cannot require the creditor to assume any part of the burden which he has made his own."

The question we now have before us was directly involved in *Kearnes v. Montgomery,* 4 W. Va., 29, and the court thus defined the relation of a surety to the creditor: "The contract of a guarantor is collateral and secondary. It differs in that respect from the contract of a surety, which is direct; and in general the guarantor contracts to pay if, by the use of due diligence, the debt cannot be made out of the principal debtor; while the surety undertakes for the payment, and so is responsible at once if the principal debtor makes default." *Hall v. Weaver,* 34 Fed. Rep., 104. The court, in *Hammel v. Beardsley,* 31 Minn., 315, draws the distinction sharply in these words: "We have not overlooked the technical distinction between the undertaking of a surety, which is primary, and that of a guarantor properly so-called, which is collateral and secondary. But one who absolutely guarantees payment of the debt is in every respect essentially a surety." Substantially the same expression is used in *Bank v. Richards,* 35 Vt., 284, where it is said: "A surety is an original maker, and becomes primarily and absolutely liable, as much so as the principal, to any party lawfully holding the paper." *Ballard v. Burton,* 16 L. R. A., 667. As we have shown, a surety is in law generally regarded as a maker of the note, and in *Hunt v. Johnson,* 96 Ala., 135, it is held, in accordance with familiar and elementary principles, that the maker of a promissory note is "the primary debtor" and is not entitled to presentment or demand for payment before suit is brought. His obligation to pay is absolute and in no sense

dependent upon a demand after maturity. The doctrine is succinctly stated in *McIntosh v. Reed,* 89 Fed. Rep., 466, where it is said that a surety undertakes to pay if the debtor does not, while in a collateral undertaking, like a guaranty, the undertaking is to pay if the debtor cannot. In the one case, there is a direct liability for the act to be performed, while in the other there is a liability for the ability only of another to perform the act. "Suretyship is a direct contract to pay the debt of another. It insures the particular claim." *Reigart v. White,* 52 Pa., 440. Indeed, in *Kilton v. Tool Co.,* 22 R. I., 611, *Douglass, J.,* for the court, said that "the words 'primary and direct' contrasted with 'secondary,' when spoken of an obligation, refer to the remedy provided by law for enforcing the same rather than to the character and limits of the obligation itself." Whether this is the meaning of those words as used in our statute, we need not inquire, for if it is, the remedy against the surety being direct and immediate, his liability within the sense given to the word by that court would still be "prmary." 2 Parsons Bills & Notes (1871), p. 118. The text writers are equally explicit in assigning the undertaking of a surety to the class of primary liabilities. "A surety is liable as much as his principal is liable, and absolutely liable as soon as default is made, without any demand upon the principal whatsoever or any notice of default. 2 Daniel Neg. Inst. (5 Ed.), sec. 1753; Tiedeman on Commercial Paper, sec. 415." "A surety is liable absolutely as principal upon default." 2 Randolph Com. Paper (2 Ed.), sec. 849; "A surety undertakes primarily, to pay if the debtor does not. A guarantor undertakes secondarily to pay if the debtor cannot." *Ibid.,* note 2; *Dart v. Sherwood,* 76 Am. Dec., 228; *Kramph v. Hatz,* 52 Pa. St., 525. "It must be remembered (it is said in 2 Parsons on Bills & Notes, Ed. 1871, at page 118), that while a surety of a note is generally a maker, a guarantor is never a maker. The surety's promise is to pay a debt, which be-

comes his own debt when the principal fails to pay it, and the surety may therefore be sued at once as soon as the note is due and dishonored."

We find nothing in the nogotiable instrument law to sustain the defense set up, either when that law is considered alone or when it is read in the light of established principles.

No Error.

REDDING v. VOGT.

(Filed March 20, 1906).

Dower—Seizin of Husband—Reversions and Remainders—Contracts—Rescission—Novation—Deeds—Reservation to a Stranger—Possession.

1. The right to dower does not attach to the lands of the husband unless he was seized during the coverture, and the husband must have an estate of inheritance.

2. Dower is not allowed in estates in reversion or remainder expectant upon an estate of freehold; and hence, if the estate of the husband be subject to an outstanding freehold estate, which remains undetermined during the coverture, no right of dower attaches.

3. When the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first.

4. Where, by the first contract to convey, a party acquired absolutely the entire estate in one-half of a tract of land, and by the second contract he was given one-half interest subject to a life estate in that tract and other land, and took a deed in execution of the last contract, and thereupon entered into possession of the land and conveyed a part of it, the last contract and deed must be regarded as a substitute for the first contract and as a rescission of it, the two transactions being wholly irreconcilable, and those claiming under him must abide by its terms.

5. While a reservation will not give title to a stranger, it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of an adverse claim to the thing excepted or reserved.

6. The actual possession of land does not in itself constitute seizin.

SPECIAL proceeding by Lillian Redding against Lucy R. Vogt and others, for dower, heard upon issues joined, by *Judge E. B. Jones* and a jury, at the Fall Term, 1905, of the Superior Court of PAMLICO. From a judgment for the plaintiff, the defendants appealed.

The plaintiff brought the proceeding for the purpose of having her dower assigned in the lands described in her petition. The evidence disclosed the following facts: 1. On February 17, 1890, John P. Redding and his wife, Elizabeth Redding, executed a deed to Lizzie C. Redding (now Lizzie C. Brown), their daughter, for two tracts of land therein described. This deed was recorded in Book 17, page 234. 2. Lizzie C. Redding, October 3, 1898, agreed in writing to convey to her brother, S. A. Redding, one-half of the land described in the deed first mentioned, reciting in the agreement that the land had been conveyed to her by her parents with the understanding that she would convey to S. A. Redding one-half thereof. 3. On June 5, 1899, John P. Redding and wife executed another deed to Lizzie C. Redding (now Lizzie C. Brown) for the land described in the first deed as well as for other tracts. This deed contained in the premises the following clause: "Reserving always to the parties of the first part an estate in the said lands for the terms of their natural lives," and in the *habendum* the following: "Excepting and reserving always unto themselves, the said John P. Redding and Elizabeth Redding, an estate for the term of each of their natural lives in and to all the lands hereby conveyed, and it is expressly agreed and understood that none of the property hereby conveyed or herein men-

tioned shall pass from the possession of the said first parties during their natural lives, and the said parties of the first part covenant to and with the said party of the second part that they are seized of said lands in fee and have a right to convey the remainder in the same, and that they will warrant and defend the title to the same against all lawful claims." 4. On the same day (June 5, 1899,) Lizzie C. Redding agreed in writing to convey to S. A. Redding a one-half interest in the land described in the second of the said deeds to her, reciting the fact that in the deed last mentioned John P. Redding and wife, who had conveyed the land to her, had reserved a life estate in all the tracts to themselves. 5. On November 18, 1901, Lizzie C. Brown (formerly Lizzie C. Redding) and her husband, E. A. Brown, joined in a deed to S. A. Redding for a part of each body of the land conveyed in the two deeds from John P. Redding and wife to Lizzie C. Redding. The deed just after the description of the land contained this clause: "Excepting always a life estate in and to the said lands for the natural life of Mrs. Elizabeth Redding." Her husband had died in the meantime. 6. S. A. Redding and wife, Lillian Redding, the plaintiff (who were married on January 8, 1902), without the joinder of Mrs. Elizabeth Redding, conveyed seventy-six acres of the said land to one Thomas A. Hadder by deed dated March 29, 1902.

S. A. Redding took possession of the land conveyed to him by E. A. Brown and wife immediately and continued in possession, treating it as his own, until his death, which occurred September 29, 1902, it being the land in controversy.

The defendants' counsel requested the court to charge the jury that if they believed the evidence, the plaintiff was not entitled to dower in the said land, and that they should therefore answer the issues in favor of the defendants. This instruction the court refused to give, but charged the jury that, if they believed the evidence, they should find that S. A.

Redding died seized and possessed of the said land and answer the issues in favor of the plaintiff. Defendants excepted. The issues, with the answers of the jury thereto, are as follows: "1. Did Shade A. Redding, husband of *feme* plaintiff, die seized and possessed of the lands in controversy? Ans. Yes; 2. If so, what part of said lands? Ans. That part of the land conveyed in the deed of J. P. Redding and wife, Lizzie C. Redding, dated February 17, 1890, and recorded in Book 17, p. 234, which is included in a deed from Lizzie C. Brown and husband to S. A. Redding, dated November 18, 1901, and registered in Book 32, p. 120."

The court adjudged upon the verdict that the plaintiff was entitled to have dower allotted in that part of the land described in the deed of John P. Redding and wife to Lizzie C. Redding, dated February 17, 1890, which was conveyed by the deed of E. A. Brown and wife, Lizzie C., to S. A. Redding, and process for that purpose was directed to be issued by the clerk. Defendants excepted and appealed.

D. L. Ward for the plaintiff.
H. L. Gibbs and *Simmons & Ward* for the defendants.

WALKER, J., after stating the case: The plaintiff seeks to have dower allotted in the lands described in her petition, and her right to the relief depends upon the construction and legal effect of the contracts and deeds mentioned in the statement of the case. It is provided by statute that a widow shall be endowed as at common law and shall be entitled to an estate for her life to the extent of one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during the coverture and to the same estate in all legal rights of redemption and equities of redemption or other equitable estates in lands, etc., of which her husband was likewise seized in fee at any time during the coverture, subject to valid incumbrances existing before, or

with her free consent created during, the coverture. Revisal, sections 3083 and 3084. The right to dower, therefore, does not attach to the lands of the husband unless he was seized during the coverture, and the husband must have had an estate of inheritance. *Houston v. Smith,* 88 N. C., 312. The word "seizin" is said to have a technical meaning when used in this connection and at common law it imported a feudal investiture of title by actual possession and with us it has the force of possession under some title or right to hold the same. It is either a seizin in deed or a seizin in law; the former being the actual possession of a freehold estate and the latter the right to the immediate possession or enjoyment of a freehold estate. Seizin applies only to freehold estates or to the possession of land of a freehold tenure. Seizin in fact or in deed has also been defined to be possession with intent on the part of him who holds it to claim a freehold interest and seizin in law as the right of immediate possession according to the nature of the estate. Washburn on Real Property, 33 and 34; *Early v. Early,* 134 N. C., 258; *Houston v. Smith, supra.* A somewhat different and broader meaning is assigned to the word "seizin" in our statutes of descent, where it is provided that every person, in whom a seizin is required by any of the rules of descent, shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance. Revisal, sec. 1556, Rule 12; *Early v. Early, supra.* "To give a right of dower, the estate of the husband must confer a right to the immediate freehold. This is an essential requisite at the common law. Dower is not allowed in estates in reversion or remainder expectant upon an estate of freehold; and hence, if the estate of the husband be subject to an outstanding freehold estate, which remains undetermined during the coverture, no right of dower attaches." *Houston v. Smith,* 88 N. C., 312, and 1 Scribner on Dower, 217. Under this settled rule of the law, the defendants contended that the plaintiff is not entitled to

dower in the lands in question, because there is an outstanding freehold estate in Mrs. Redding by virtue of the deed of J. P. Redding and wife to Lizzie C. Redding, dated June 5, 1899, the contract between Lizzie C. Redding and S. A. Redding, dated June 5, 1899, and the deed of E. A. Brown and wife (formerly Lizzie C. Redding) to S. A. Redding, dated November 18, 1901. The plaintiff on the other hand insists that she is entitled to dower for either of two reasons: first, because by the agreement between Lizzie C. Redding and S. A. Redding, dated October 3, 1898, the latter acquired an equitable estate in fee in so much of the land as is described in that agreement and that as, under our statute, a widow is now dowable in an equitable estate, contrary to the rule of the common law (*Fortune v. Watkins,* 94 N. C., 314,) she is now entitled to have her dower set apart in those lands and, second, because the reservation of the life estate in the agreement of June 5, 1899, and the deed of November 18, 1901, is to persons who were strangers to the contract and deed and therefore void. In this conflict of views, as to the law of the case, our opinion is with the defendants. If the contract of October 3, 1898, had not been followed by that of June 5, 1899, and by the deed of the same date made in execution of it, there would be force in the plaintiff's contention, but it is apparent to us that the latter contract and deed were made as substitutes for the contract of Ocober 3, 1898, and that, by the transactions between them, the parties clearly intended to rescind that contract and to give full force and effect to the latter contract and the deed made under it. That parties may rescind a contract, either expressly or by substituting another in its place which is so inconsistent with it that the two cannot well co-exist and operate at one and the same time, cannot be doubted. Rights acquired under a contract may be abandoned or relinquished either by agreement, or by conduct clearly indicating such a purpose. *Falls v. Carpenter,* 21 N. C., 237; *Faw v. Whittington,* 72 N. C., 321;

Miller v. Pierce, 104 N. C., 389; *Holden v. Purefoy,* 108 N. C., 163; *Taylor v. Taylor,* 112 N. C., 27; *Gorrell v. Alspaugh,* 120 N. C., at p. 368; *May v. Getty,* 140 N. C., 310. *Lipschutz v. Weatherly,* at this term. A contract may be discharged by the substitution of a new contract, and this results: (1) Where a new contract is expressly substituted for the old one; (2) where a new contract is inconsistent with the old one; (3) where new terms are agreed upon, in which case a new contract is formed, consisting of the new terms and of the terms of the old contract which are consistent with them, and (4) where a new party is substituted for one of the original parties by agreement of all three. Clark on Contracts, p. 610, sec. 260. The authorities are numerous to the same effect. It was held in *Choceco Bank v. Perry,* 52 Me., 293, that where parties make two contracts upon the same subject matter, which cannot be reconciled without rejecting some of the material stipulations in the one or the other or both, the court will not enter upon this work of expurgation, but will endeavor to give effect to the one contract or the other, as the intention of the parties shall seem to require. Substantially the same ruling was made in *Snow v. Russell,* 36 Ill., 185; *Chrismen v. Hodges,* 75 Mo., 413. The principle is thus stated in *Harrison v. Polar Star Lodge,* 116 Ill., 287: "When the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of *novatio* in the Roman Law. When an agreement is thus rescinded by novation, the contract in existence prior to the novation loses its individuality, and becomes merged in the new contract. Any circumstances or course of conduct from whence can be clearly deduced an agreement to put an end to the original contract, will amount to a rescission of it." Fry on Specific Performance (3 Am. Ed.), sections 998, 1009, *et seq.* In *Patmore v. Colburn,* 1 C. M. & R. (Exch.), 65, *Lord Lyndhurst* said that, when the provisions of two con-

tracts are inconsistent and the second cannot be operative if the first is still in existence, the first is no longer a subsisting agreement. *Hart v. Lauman,* 29 Barbour, 410; *Paul v. Meservey,* 58 Md., 419. Many other decisions of the same import might be cited. If, upon the facts of our case, therefore, we can gather that the parties intended the two contracts not to co-exist, and the second was designed to take the place of the first, the former must be taken to embody the entire and final agreement of the parties. *Mather v. Butler County,* 28 Iowa, 253. By their first deed John P. Redding and wife conveyed to Lizzie C. Redding the land, one-half of which she subsequently agreed to convey to her brother, S. A. Redding. After the making of this agreement, and on the 5th day of June, 1899, John P. Redding and wife conveyed to Lizzie C. Redding, not only the land embraced by their first deed to her, but another large body of land excepting and reserving a life estate to themselves in all the lands and thereafter, on the same day, Lizzie C. Redding agreed to convey to S. A. Redding one-half of the lands which she acquired by the last deed from her parents, reciting in the contract that, by the deed she had received, a life estate was reserved to John P. Redding and his wife. Afterwards, and in performance of this agreement, Lizzie C. Brown (formerly Redding) and her husband conveyed to S. A. Redding certain tracts of land and interests in other tracts, all of which consisted of portions both of the land described in the first deed of John P. Redding and wife to Lizzie C. Redding and of the additional land conveyed by their second deed, excepting and reserving a life estate to Elizabeth Redding, then the widow of John P. Redding, who had died. S. A. Redding took possession of the lands so conveyed to him by Mrs. Brown, claiming them as his own, and actually sold and conveyed 76 acres of the same to one Thomas A. Hadder. It does not seem to us that a stronger case of an election, on the part of S. A. Redding, to take under the second contract and

the deed made in pursuance thereof could be presented. It was impossible for the first and second transactions to stand together. By the first contract, S. A. Redding acquired absolutely the entire interest and estate in one-half of the land, according to the very terms of the instrument, and by the second he was given only a remainder in one-half of that and other land, that is, a one-half interest therein subject to the life estate. His acceptance of the last contract is conclusively established by his taking the deed from his sister and thereupon entering into possession of the land and conveying a part of it to another. The first and second contracts could not, therefore, stand together, because the two estates conveyed are radically different, one being the entire fee, and the other only a remainder. If he claimed under the first contract, he must necessarily have rejected the second, and if he claimed under the second contract and the deed made in fulfillment of it, he must just as surely have rejected the first contract. He acquired additional land under the second contract and the deed, which he could not in good conscience keep and at the same time repudiate the provisions of the deed by virtue of which he asserted his right to it. If he had claimed under the first contract, the life estate excepted in the second contract and the deed to him would necessarily fail. When he claimed under the second contract and the deed, he thereby as fully recognized the existence of the life estate as if he had expressly done so by an instrument in due form of law, and those claiming under him will not be allowed to assert a right or title totally inconsistent with his deliberate choice so clearly manifested and in contravention of the just rights of others who must be held to have acquired interests, by virtue of his election, which induced them to part with their land upon the faith of the rectitude of his conduct. The last contract and the deed made to S. A. Redding must be regarded as a substitute for the first contract and as a rescission of it, the two transactions being

wholly irreconcilable. We do not leave out of consideration the second deed from John P. Redding and wife to Lizzie C. Redding, as that must be treated as a part of the transaction by which the first contract was rescinded. Lizzie C. Redding could not have made the second contract and the deed in execution of it, so as to convey to S. A. Redding the additional land described in the second deed of John P. Redding and wife, if she had not received that deed, and he was as much bound by the provisions of the deed as by those of the subsequent contract between Lizzie C. Redding and himself and the deed by her and her husband to him. He derived his title to the additional land under the second deed of John P. Redding and wife to his sister, and those claiming under him must abide by its terms. He having deliberately taken benefit under it, they will not now be heard to say that he did not intend to rescind the first contract and substitute the second one and the deed to him in its place. All this occurred before the plaintiff and S. A. Redding were married, and at no time, therefore, during the coverture has he had any equitable interest or estate in the land under the first contract.

Having come to this conclusion, the remaining question will not be difficult of solution. It is undoubtedly true that a reservation cannot be made to a stranger. We find the principle stated in Warvelle on Vendors, p. 474, as follows: "It is a rule that a reservation must be to the grantor and not to a stranger, but while a reservation will not give title to a stranger, it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or 'reserved.' It must not be understood, however, that the exception in such case gives title to such third person, for no one not a party to the deed can acquire any rights or interests in the land by virtue of any exception therein contained more than by a reservation; yet, where third parties already possess rights adverse to those conveyed, an exception may properly

be made for the purpose of relieving the grantor from liability on his covenants. The exception, in such event, operates as a recognition of the existing rights of third persons, and serves to convey notice to the grantee." Hopkins on Real Property, 418. It is familiar learning that a reservation *(reddendum)* is a clause in a deed, whereby the grantor reserves some new thing to himself issuing out of the thing granted and not *in esse* before, while an exception is always of a part of the thing granted or out of the general words and description in the grant. Being ever a part of the thing granted, it takes something out of the grant which would otherwise pass thereby. 4 Kent Com., 468; Sheppard's Touchstone, 77, *et seq.; Wall v. Wall,* 126 N. C., 405; Hopkins on Real Property, *supra.* Whether the clause in the deed to S. A. Redding, which is in the form of an exception, can operate as such under the principle stated in Warvelle on Vendors, it is not necessary to say, as it follows from what we have already decided that the second deed of John P. Redding and his wife to Lizzie C. Redding must be construed with the second contract and the deed to S. A. Redding as one transaction and as intended to supersede the first contract, and that being so, the reservation by John P. Redding and wife to themselves in their second deed of a life estate is valid and effectual and prevented the vesting of an immediate estate of freehold in S. A. Redding, he having taken under a contract and deed which expressly recognizes the existence of the life estate in John P. Redding and his wife, which was created by that second deed. The mere fact that he was bound by the provisions of that deed, deprived him of any claim to a present estate of freehold. It follows that the plaintiff cannot have dower for want of the seizin of her husband, for the right of dower, as we have said, can attach only when the husband has the immediate estate of freehold as well as the inheritance, and here the tenant for life was living at the death of the husband, and at no time during the coverture

could the latter have had the requisite seizin. *Weir v. Humphries,* 39 N. C., 264.

We do not know upon what ground His Honor placed his decision. There was evidence that S. A. Redding had actual possession of the land, but this fact, while it tends to show that he accepted and treated the second contract and deed as a rescission of the first contract, did not in itself constitute seizin, for the bare possession of land is not seizin. *Barnes v. Raper,* 90 N. C., 189; *Efland v. Efland,* 96 N. C., 488.

Upon the consideration of the whole case, we conclude that S. A. Redding had no equitable estate in the land under the first contract, at the time of his death, and no seizin sufficient to support the plaintiff's claim of dower.

There was error in the charge given by the court and the case must again be submitted to a jury with proper instructions as to the legal effect of the facts, disclosed by the evidence, in determining the rights of the parties.

New Trial.

JOHNSON v. RAILROAD CO.

(Filed March 20, 1906).

Railroads —Negligence —Fires —Damages Recoverable — Profits—Evidence.

1. In an action for damages for the negligent burning of plaintiffs' factory, evidence that plaintiffs had a contract to deliver a certain number of crates at a fixed profit; that they had on hand the material to complete this contract at the date of the fire, and that it was impossible to replace this material, was competent to be heard by the jury upon the issue of damages.

2. When the cause of action is based upon a wrongful invasion of plaintiff's rights of person or property, he may recover all such damages, either direct or consequential, as flow naturally and proximately from the trespass, whether they could or could not have been anticipated.

3. Where the profits lost by defendant's tortious conduct, proximately and naturally flow from his act and are reasonably definite and certain, they are recoverable; those which are speculative and contingent, are not.

ACTION by A. F. Johnson and R. F. Johnson, trading under the firm name of A. F. Johnson & Son, against Atlantic Coast Line Railroad Co., heard by *Judge W. R. Allen* and a jury, at the October Term, 1905, of the Superior Court of SAMPSON.

This was a civil action for the recovery of damages for the alleged negligent burning by defendant corporation of a building used by plaintiffs, A. F. Johnson & Son, for the manufacture of crates, baskets, etc. Plaintiffs set forth in their complaint that "they had accumulated upon said premises valuable forms, tools, fixtures, office supplies, furniture, etc., also large quantities of crates, baskets, etc., already manufactured; large quantities of crates, baskets, etc., in course of manufacture, and large quantities of raw material for the manufac-

ture and completion of other crates and baskets. And plaintiffs further allege that, at said time, they had contracted and agreed to furnish to various persons, firms and corporations, an output of 75,000 completed crates from their said factory, upon which they would have realized a reasonable profit of $3,500, but for the loss and destruction of the aforesaid property by fire," etc. Defendant not having sufficient knowledge or information to form a belief, denied this allegation. The plaintiffs upon the issue in regard to damages offered to show that they had a contract with the East Carolina Fruit Packing Co., to deliver 75,000 berry crates at a fixed profit of $3,500; that they had accumulated the material to complete this contract, and had the same on hand on November 29, 1904, when they were burned out; that it was impossible to replace this material in any of the markets of the country, and they lost the year's work; their laborers and servants were, for a long time, idle upon their hands, at heavy expense. This testimony was, upon defendant's objection, excluded. Plaintiffs excepted and assigned as error, upon the issue in regard to damages, the rejection of the proposed testimony, and appealed.

Grady & Graham for the plaintiffs.

Junius Davis and *Stevens, Beasley & Weeks* for the defendant.

CONNOR, J., after stating the facts. His Honor, we presume, was of the opinion that the anticipated profits to be derived from completing the contract made by plaintiffs with the Fruit Packing Co., for the manufacture and delivery of the crates, were too speculative and conjectural to form the basis of a claim for damages. While this court has uniformly adhered to the rule in *Hadley v. Baxendale,* prescribing the measure of damages recoverable for breach of contracts, we find no decision controverting the proposition, held by other courts and laid down by many text writers, that in actions

founded upon a pure tort a different rule prevails. Mr. Sutherland, after discussing many decided cases, says: "The correct doctrine, as we conceive, is that if the act or neglect complained of was wrongful, and the injury sustained resulted in the natural order of cause and effect, the person injured thereby is entitled to recover. There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct; he is responsible therefor because the result proximately follows his wrongful act or non-action." 1 Damages, 16. "A *tort feasor* is liable for all injuries resulting directly from his wrongful act, whether they could or could not have been seen by him. * * * The real question in these cases is, did the wrongful conduct produce the injury complained of, and not whether the party committing the act could have anticipated the result." Hale on Damages, 36, 8 Am. & Eng. Enc. (2 Ed.), 625.

Sledge v. Reid, 73 N. C., 440, was an action of trover, for the wrongful taking of plaintiff's mule. *Bynum, J.,* said: "Consequential damages to be recovered in an action of tort must be the proximate consequence of the act complained of, and not the secondary result thereof." The court, in *Welch v. Piercy,* 29 N. C., 365, thus states the same doctrine: "Every man, in law, is presumed to intend any consequence, which naturally flows from an unlawful act, and is answerable to private individuals for any injury so sustained." Whatever distinctions may be recognized between actions founded upon tort, pure and simple, and those in which the cause of action is tort growing out of a breach of contractual duty—such as actions by passengers for wrongful ejection, shippers for failure to deliver freight, or parties in interest for failure to deliver telegrams, it is well settled that when the cause of action is based upon a wrongful invasion of plaintiff's rights of person or property, he may recover all such damages, either direct or consequential, as flow naturally

and proximately from the trespass. When the action is for breach of contract, the damages recoverable are such as naturally flow from the breach and such special or consequential damages as are reasonably presumed to have been within the contemplation of the parties at the time they made the contract as the probable result of a breach of it. In ascertaining what damages come within the rule it is proper to examine, not only the terms of the contract, the subject matter, etc., but also to inquire whether such circumstances or conditions as produced special damages were communicated to the defendant. We apprehend that the same rule prevails when an action in the nature of tort is brought for the breach of a duty arising out of contract. *Williams v. Telegraph Co.*, 136 N. C., 82; *Dayvis v. Telegraph Co.*, 139 N. C., 79. In *Lee v. Railroad*, it is said: "It is immaterial whether we treat the cause of action as for a breach of contract, or for a negligent omission to perform a public duty arising out of contract." We were then considering the measure of damages for failure to deliver freight. When a party commits a trespass, he must be held to contemplate all the damages which may legitimately follow from his illegal act. In *Brown v. Chicago, etc., Railroad Co.*, 54 Wis., 354, it is said: "The general rule is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as the result of the act done."

Judge Christiancy, in *Allison v. Chandler*, 11 Mich., at page 561, says: "It is urged by counsel for the defendant that damages for the loss of profits ought not to be allowed, because they could not have been within the contemplation of the defendant. Whether, as a matter of fact, this is likely to have been true, we do not deem it important to inquire. It is wholly immaterial whether the defendant in committing the trespass actually contemplated this, or any other species of damage, to the plaintiff. It is a consideration which is con-

fined entirely to cases of contracts, when the question is, what was the extent of the obligation in this respect, which both parties understood to be created by the contract. But when a party commits a trespass, he must be held to contemplate all the damages which may legitimately flow from his illegal act." *Stevens v. Dudley,* 56 Vt., 158.

We are thus brought to a consideration of the question whether the proposed testimony was competent to be considered by the jury in assessing plaintiffs' damages. "It was at one time laid down as a general rule that damages could not be recovered for the loss of profits. It was thought that profits were in their nature too uncertain to be considered." Hale on Dam., 72. "The rule is subject, however, to the modification that if the profits lost by defendant's tortious conduct, proximately and naturally flow from his act and are sufficiently definite and certain, they may be recovered or at least evidence in respect to them may be heard and considered by the jury in fixing such damages as will compensate plaintiff. Profits which would certainly have been realized, but for the defendant's fault, are recoverable; those which are speculative and contingent are not." *Ibid. Judge Christiancy,* in *Allison v. Chandler, supra,* says: "But whatever may be the rule in actions upon contract, we think a more liberal rule, in regard to profits lost, should prevail in actions purely of tort (excepting, perhaps, the action of trover). Not that they should be allowed in all cases without distinction; for there are some cases where they might in their nature be too entirely remote, speculative or contingent to form any reliable basis for a probable opinion. * * * But generally in an action purely of tort, when the amount of profits lost by the injury can be shown with reasonable certainty, we think they are not only admissible in evidence, but that they constitute, thus far, a safe measure of damages." Sutherland, vol. 1, sec. 70, says: "If a regular and established business is wrongfully interrupted, the damage thereto can be shown by

proving the usual profits for a reasonable time anterior to the wrong complained of. In *Schile v. Brokahaus,* 80 N. Y., 614; *French v. Lumber Co.,* 145 Mass., 261.

In *Jackson v. Stanfield,* 137 Ind., 592, it is held that evidence is admissible showing anticipated profits, not remote or speculative, not as the measure of damages, but to aid the jury in estimating the extent of the injury sustained." *Fibre Co. v. Electric Co.,* 95 Me., 318; *Gwaltney v. Timber Co.,* 115 N. C., 579; *Jones v. Call,* 96 N. C., 337.

Willis v. Branch, 94 N. C., 142, was an action for a trespass upon a public hall leased by plaintiff, and removing an oil tank used for lighting. Plaintiff claimed as special damage loss of profits on contracts made with theatrical companies. This court said: "If plaintiff had existing engagements for theatrical entertainments, that were disappointed by the injury, damages sustained on that account might be embraced—but not for such as he might probably have had." Mr. Sutherland quotes with approval the language used by the court in *Allison v. Chandler, supra:* "When from the nature of the case, the amount of damages cannot be estimated, with certainty, or only a part of them can be so estimated, there is no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructons and advice from the court as the circumstances of the case may require, or as may tend to prevent the allowance of such damages as may be merely possible, or too remote and fanciful in their character to be safely considered as the result of an injury." 4 Sutherland, sec. 1029.

In the light of the principles announced in the foregoing authorities, we are of the opinion that the testimony in regard to the contract with the Fruit Packing Co. was competent to be heard by the jury upon the question of damages sustained

by plaintiffs, A. F. Johnson & Son. It is by no means certain that the jury should fix the damages in that respect at the profits which plaintiff would have made on the manufacture and delivery of the crates, but they may take into consideration the terms of the contract, the position of plaintiffs in regard to its completion, the solvency of the Packing Company and all other competent and relevant testimony casting light upon the value of the contract to plaintiffs at the time of the fire. While in all human affairs there is of necessity an element of uncertainty, the law, which seeks to deal as far as practicable with conditions in a practical way, and as near as may be give compensation for injuries sustained, only demands, as the basis of the claim, reasonable certainty. If plaintiffs had been considering a proposition to sell their factory with its outstanding contracts, it would have been entirely practicable to measure with reasonable certainty its enhanced value by reason of the existence of the contract with the Packing Company. In doing so the cost of the material on hand, the cost of manufacturing and delivering, the contingencies usually attendant upon and incident to the business, the solvency of the Packing Company, etc., would have been considered. The jury having found that plaintiffs' factory was destroyed by the negligence of defendant, they are entitled to recover all such damages as naturally and proximately flow from the trespass—the value of the contract in the light of the facts proposed to be shown by the question asked the witness should be considered as coming within the rule. This, of course, excludes any evidence in regard to profits not covered by contracts. They would be speculative. There might be no demand for crates, prices might decline, a short crop of berries might decrease the demand or a large crop enhance it. These, and many other, contingencies not remote, would enter into the problem, which would render any conclusion unreliable and unsatisfactory. For the rejection of the proposed testimony there must be a new trial.

In several of the cases cited in this opinion, the term "injury" is used. The term as used must be understood as synonymous with "damages." The authors are discussing the character of damages for which a party guilty of negligence, resulting in injury, is liable, and not the question of proximate cause. It is only in this view that the word "injury" is to be understood. The jury have, under instructions to which there are no exceptions, found that defendant is guilty of actionable negligence. The exception is pointed only to the exclusion of evidence in regard to damages. The costs should be divided equally between the parties.

New Trial.

JOHNSON v. RAILROAD.

(Filed March 20, 1906).

Railroads—Negligence—Fires—Evidence—Impeachment of Witness.

1. In an action for damages to property alleged to have been burned by the emission of sparks from defendant's engine, it is competent to show that the same engine, shortly before or after the fire in question, emitted sparks.

2. Evidence that on the day after the burning of plaintiffs' factory, a car of hulls attached to the engine, which it was alleged set fire to the factory, was seen on fire, is irrelevant as tending to prove the fact in issue—that the engine by the emission of sparks set fire to the factory.

3. As a condition precedent to the admissibility of evidence, either direct or circumstantial, the law requires *an open* and *visible* connection between the principal and the evidentiary facts, whether ultimate or subordinate. This does not mean a *necessary* connection, that would exclude all presumptive evidence, but such as is reasonable and not latent or conjectural.

4. Where defendant's witness testified to facts tending to show that plaintiffs' factory was not fired by defendant's engine and he was asked on cross-examination, whether or not he had made contradictory statements, which he denied, it was competent to show that he had made such statements, as impeaching but not as substantive evidence.

ACTION by A. F. Johnson and R. F. Johnson, trading under the firm name of A. F. Johnson & Son, against Atlantic Coast Line Railroad Co., heard by *Judge W. R. Allen* and a jury, at the October Term, 1905, of the Superior Court of SAMPSON. From a judgment for the plaintiffs, the defendant appealed.

Grady & Graham for the plaintiffs.

Junius Davis and *Stevens, Beasley & Weeks* for the defendant.

CONNOR, J. Plaintiffs allege that their crate and basket factory was burned by the emission of sparks from defendant's engine, the result of defective construction or negligent management. For the purpose of showing that the engine used by the defendant on the day of the fire, emitted sparks, plaintiffs introduced testimony to the effect that defendant used the same engine on its road from Warsaw to Clinton, several days before, and after, and on the day of the fire. They thereupon introduced R. B. Faison, who testified, after objection by defendant, that he was at Turkey, a station between Warsaw and Clinton, the distance between the two points being about twelve miles, on the day of the fire and next day thereafter. That on the last named day he came to Clinton on the train. Thought it was the same train which went to Clinton on the day of the fire. Did not see the engine on the day of the fire, nor the day before. When train reached the "Y" it stopped. There was a car load of cotton seed hulls attached to the train, or making a part thereof—

second car from the engine; the hulls were on fire. Employees were carrying water from the engine to put on the fire. Saw smoke coming out of the top of the car. Defendant insists that, in the absence of any evidence tending to show that the hulls were fired by the engine, the testimony was irrelevant and incompetent. The plaintiffs contend that it is competent for them to show that the same engine, shortly before or after the fire in question, emitted sparks. In this we concur. The proposition is well stated and sustained by abundant authority, being entirely consistent with the reason of the thing, in 11 Am. & Eng. Enc. (2 Ed.), 512. The decision of this court in *Ice Co. v. Railroad Co.*, 126 N. C., 797, is not in conflict with this principle. In that case, it was held incompetent to show that engines, other than the one which set fire to the property, emitted sparks. In *Cheek v. Lumber Co.*, 134 N. C., 225, it was proposed to show that the engine alleged to have set fire to the wood, twelve months before the fire in question, and at another place, emitted sparks. This was held to be irrelevant. The defendant's exception, however, is based upon the contention that, assuming the fact testified to by Faison to be true, that on the day after the burning of plaintiffs' factory, a car load of hulls attached to the engine, which it was alleged set fire to the factory, was seen on fire, it did not tend to prove the fact in issue,—that the engine, by the emission of sparks, set fire to plaintiffs' factory. The witness does not say that the hulls were set on fire by the engine or that the engine emitted sparks. The evidence relied upon by plaintiffs to show that defendant's engine set fire to their factory is circumstantial. No witness says that he saw the fire communicated to the factory. There is evidence other than that of Faison, both competent and relevant to be considered by the jury, tending to sustain plaintiffs' contention. Was the testimony of Faison relevant? That is, did it tend to prove the plaintiffs' allegation? If the witness had testified that the cotton seed hulls were fired

by sparks from the engine, or that the engine emitted sparks at or about the time that they were found to be on fire, such condition would have been relevant upon the question whether the engine emitted sparks at the time of the fire. The question, therefore, resolves itself into this. Does the condition dsecribed by the witness Faison reasonably tend to show that the fire was communicated to the hulls by the engine? If suit had been brought by the owner of the hulls, charging that they were burned by the negligence of defendant, he would, in the absence of any explanation in regard to the origin of the fire, have been entitled to recover; not, however, because any inference would have been drawn that the engine communicated the fire, by emitting sparks, but because the carrier was an insurer and could only escape liability by showing that the fire was caused by the act of God or the public enemy. The principle upon which the relevancy of proposed testimony depends, has been frequently announced by this court and the authoritative writers on the law of evidence. The difficulty is frequently found in its application. *Pearson, J.*, in *Bottoms v. Kent*, 48 N. C., 154, approving the language of Best on Evidence, says: "The rule, that evidence which is too remote is inadmissible, may be stated thus: that as a condition precedent to the admissibility of evidence, either direct or circumstantial, the law requires an *open* and *visible* connection between the principal and the evidentiary facts, whether ultimate or subordinate. This does not mean a *necessary* connection, that would exclude all presumptive evidence, but such as is reasonable, and not latent or conjectural." *Henderson, J.*, in *Hart v. Newland*, 10 N. C., 122, says: "Evidence is of two kinds; that which is true, directly proves the fact in issue, and that which proves another fact, from which the fact in issue may be inferred. The rules regarding competency only, apply to the first kind of evidence, and relevancy, to the second. * * * That the fact to be inferred *often* accompanies the fact proven, is not suf-

ficient, it should most usually accompany it; and I would say, in the absence of all circumstances, that it should rarely otherwise happen." In that case the action was for deceit in the sale of a slave; for the purpose of showing a *scienter,* the plaintiff was permitted to show that the slave was a runaway, and while hiding out, defendant's wife had been seen carrying food to him. The learned justice, of whom *Pearson, C. J.,* said, "his power of reflection exceeded that of any man who ever had a seat on this bench, unless *Judge Haywood* be considered his equal," said, by way of illustration, in regard to the testimony: "But the strong objection in this case is, that there must be two inferences drawn, to-wit: The wife saw and fed the slave, *ergo* she knew he was diseased, that the wife knew it, *ergo,* the husband knew it, being informed by her; an error in either inference which might very well happen, would introduce a falsehood; which * * * is an object of more solicitude than the exclusion of the truth." *Hall, J.,* dissented, showing that two learned judges drew entirely different inferences from the same fact. The language of *Judge Henderson* is cited with approval by *Rodman, J.,* in *State v. Vinson,* 63 N. C., 335, in which he approves Roscoe's statement of the law. "When the fact itself cannot be proved, that which comes nearest the proof of the fact is the proof of the circumstances that necessarily and usually attend such fact." "If the fact offered to be proved be equally consistent with the existence, or nonexistence, of the fact sought to be inferred from it, the evidence can furnish no presumption either way, as in such a case, the one fact does not most usually attend the other." The principle upon which the admissibility of this class of testimony, with its limitations, rests is discussed by *Ruffin, J.,* in *State v. Brantley,* 84 N. C., 766. He says: "Amongst other hazards and inconveniences, it was found that to allow evidence to be given touching every collateral matter that could be supposed, however remotely, to throw any light upon

the main fact sought to be established, had the effect to render trials complicated, and to confuse and mislead, rather than enlighten the juries, and at the same time to surprise the party on trial, who could not come prepared to disprove every possible circumstance, but only such as he might suppose to be germane and material. And therefore the main rule was adopted of restricting the inquiry to such facts as, though collateral to the matter at issue, had a *visible, reasonable* connection with it—not such a connection as would go to show that the two facts, the collateral one and the main one, sometimes, or indeed, often, go together, but such as would show that they *most usually* do so." Thayer on Ev., 264-5. The general rule is much modified by the occasion of its application. As, when the intent, knowledge, etc., is the fact in issue, conduct of the defendant in other transactions of like character is admitted. *State v. Murphy,* 84 N. C., 742, and numerous illustrative cases. Applying the general rule to this record, we are of the opinion that the testimony of Faison was not relevant. To give it any probative value, the jury must infer that the hulls were fired by the engine. While it does not clearly appear it would seem that they were in a box car. Witness said that he saw "smoke coming out of the top of the car." So far as we can see, the jury had no information in that regard. It can hardly be said that the fact shown—that the hulls were on fire—had a visible, reasonable connection with the fact in issue—that the engine emitted sparks. More than one conjecture could be reasonably advanced as to the origin of the fire in the car. It does not appear whether the doors were open when the fire was discovered—the fact that smoke was seen coming from the top of the car would seem to indicate that the doors were closed. We do not find any evidence tending to explain the origin of the fire in the car—and we are unable to see how the jury could do so. As was said in *Armstrong v. Railroad,* 130 N. C., 64, "But none of the evidence connects the origin of the fire

with any sparks or cinders emitted from the engine." If there is no evidence that the hulls were fired by sparks from the engine, of course the fact that they were seen on fire had no visible connection with the condition of the engine, which is the condition from which it is sought to show the fact in issue—that plaintiffs' property was fired by sparks from the engine. We would not be understood as saying that it was necessary to show, by an eye-witness, that the hulls were fired by sparks from the engine. Conditions may have been shown reasonably pointing to that conclusion, in which case the jury may have reasonably inferred that the same engine on the day previous emitted sparks at or near the plaintiffs' factory. The *hiatus* in the process of reasoning is the absence of evidence that the hulls were fired by the engine and without this the entire structure is without foundation. As was said by *Ruffin, J.*, in *Brantley's case, supra:* "We fully recognize the difficulty which a judge presiding on the circuit must experience when called hastily to determine between that which amounts to slight evidence and that which constitutes no evidence." *Cheek v. Lumber Co.*, 134 N. C., 225. It is impossible for us to see what weight the jury attached to Faison's testimony. The rule which we find pursued by this court in such cases is to grant a new trial.

For the reasons stated we are of the opinion that the testimony of McKinnon was competent. He testified that he saw sparks coming from the engine the day after the fire. He does not locate the place, but we take notice of the fact that the distance between Warsaw and Clinton is only twelve miles. He was in the rear car. He says that the sparks which he saw did not set fire to anything.

We have examined the defendant's other exceptions and do not think that they can be sustained. Both witnesses—Duncan and Hodges—had testified to facts which tended to show, and, if believed, did show, that plaintiffs' factory was not fired by defendant's engine. They were asked whether

or not they had made contradictory statements, thus laying the basis for introducing impeaching evidence. It therefore became competent to show that they had made statements contradictory to their testimony. His Honor confined such testmony to proper limits, as impeaching the witnesses. *State v. Wright,* 75 N. C., 439; *State v. Goff,* 117 N. C., 755.

We concur with defendant's counsel that the statements of the witnesses would not be competent as substantive evidence. We do not think that testimony in respect to which contradictory statements were admitted, was opinion evidence. They had testified to substantive facts. For instance, the witness Duncan testified that when he saw the house, the fire was flaming from the top of the crates—that the whole thing was on fire; that the fire was on top of the block, which was sitting in a ditch; that there was no grass around that block—nothing but sand. This, and similar testimony, was for the purpose of excluding the suggestion that the factory was fired by sparks from the engine. He was asked on cross-examination whether he had not told Fred Owen that the engine set the factory on fire. This he denied. It was competent to contradict him in that respect. The same is true as to the testimony of Len Hodges.

For the error pointed out herein there must be a

New Trial.

FISHBLATE v. FIDELITY CO.

(Filed March 20, 1906).

Accident Insurance—Material Misrepresentation—Warranty —Harmless Error—Reply—Issues—Knowledge of Agent.

1. In an action for indemnity on an accident policy where, on an issue involving the question as to whether the plaintiff, in representing himself to be sound physically and mentally, made a false statement on a matter material to the contract, a charge that a misrepresentation to become material, must be as to a defect which contributes in some way to the loss for which indemnity is claimed, is erroneous.

2. Every fact untruly asserted or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premiums.

3. In an action for indemnity on an accident policy, where the jury found that the defendant knew of the mental and physical condition of the plaintiff at the time the policy was issued, a judgment in favor of the plaintiff will not be disturbed for an error in the charge on the issue as to the warranty.

4. In an action for indemnity on an accident policy where the answer set up a breach of warranty by way of defense, a reply was not required, and the court properly submitted an issue as to whether the defendant had knowledge of the mental and physical condition of the plaintiff at the time the policy was issued.

5. Where the local agent of an insurance company has actual knowledge of the falsity of a statement made by the insured in his application, and forwards the application upon which the policy is issued, the knowledge of the agent is the knowledge of the company, and the false statement will not avoid the contract, in the absence of any evidence of actual fraud on the part of the applicant and the agent.

6. The clause in an accident policy that "no notice or knowledge of the agent or any other person shall be held to effect a waiver or change in this contract or any part of it," is ineffective for the purpose designed.

FISHBLATE *v.* FIDELITY CO.

ACTION by S. H. Fishblate against Fidelity and Casualty Co., heard by *Judge W. R. Allen* and a jury, at the October Term, 1905, of the Superior Court of NEW HANOVER.

The plaintiff, holding an accident policy in the defendant company, which in terms covers the injury, files his complaint alleging the loss of an eye by accidental injury received when crossing the streets in the city of Wilmington, on or about February 12, 1904, and offered evidence tending to show that the injury so received resulted in inflammation of the eye, which necessitated its removal by surgical operation; that notice was given and demand duly made on the company for the amount due on the policy.

The defendant admitted the policy and the loss of the eye and demand duly made, but alleged that the loss of the eye resulted not from accidental and external injury, but from pre-existent disease, and further resisted recovery on the ground that the plaintiff had made material misrepresentations, inducing the contract, as to his physical and mental condition at the time the policy was applied for.

The plaintiff replied, claiming that no such misrepresentations or concealments had been made by him, and further that the defendant's agent with whom he dealt had full notice and knowledge of the plaintiff's exact physical and mental condition at the time the policy was taken out. This reply was not formally drawn out and made a part of the pleadings, but an issue addressed to this question was submitted, the court stating that in its opinion no formal reply was required in order to raise the issue, but if he decided otherwise, he would permit the plaintiff to amend the pleadings in this respect. The defendant excepted.

There was testimony on the part of defendant tending to show that sometime previous to taking out the policy, the plaintiff's eye had been diseased and the same had thereby been weakened and left with a tendency to inflame, and there was some evidence tending to show that the plaintiff was not

sound in some other respects, having rheumatic gout, etc. There was testimony from the plaintiff to show that eight or ten years ago the plaintiff's eye had become inflamed, causing ulceration and necessitating a surgical operation, but that the eye had permanently healed, and while the sight was somewhat impaired, the eye was sound and well and no longer gave any trouble. Experts testified that the eye was cured, but the sight somewhat impaired. There was evidence also to the effect that the defendant's agent, at the time the policy was applied for and taken out, was fully aware of the trouble the plaintiff had had with his eye and its present condition, and that he was also fully informed of the plaintiff's physical and mental condition.

Issues were then submitted and, under the charge of the court, answered by the jury as follows: 1. Was the plaintiff's eye lost as a result directly and independently of all other causes from bodily injuries sustained through external, violent and accidental means? Yes. 2. Did the plaintiff warrant in the contract of insurance that he was in a sound condition mentally and physically? Yes. 3. If so, was said warranty false? No. 4. If so, was it knowingly false? (There was no answer to this issue, it not being necessary). 5. Did the defendant have knowledge of the mental and physical condition of the plaintiff at the time the policy was issued? Yes. 6. And it being agreed by both plaintiff and defendant that the amount of damage, if any, should be $1,700 and interest, and be answered by the court, and the court so answered. Judgment on the verdict. Defendant excepted and appealed.

Meares & Ruark for the defendant.

John D. Bellamy, Rountree & Carr and *W. J. Bellamy* for the plaintiff.

HOKE, J., after stating the case: The issues submitted and answered by the jury are determinative of the controversy

in the plaintiff's favor, and we find no error which requires that a new trial should be awarded. In response to the first issue, the jury have answered that the plaintiff's eye was destroyed by external, violent and accidental means, directly and independently of all other causes. The verdict on the second issue established a warranty in the contract of insurance that the plaintiff was sound mentally and physically when the same was made, and, on the third issue, that this warranty has not been broken.

There is no exception to the charge of the court on the first and second issues. On the third issue the defendant excepts for that the court charged the jury among other things as follows: "So that it becomes material to inquire under that issue (the third) what is meant by sound physically and mentally. This does not mean that a person should be perfect both in mind and body, but it means that he should not be so impaired in body and mind as to materially cause the injury complained of. If you find from the evidence that the condition of his eye was such that he would ultimately have lost sight, without the interference of external and accidental causes, though not at the time he did lose it, then he would not be sound physically and mentally within the meaning of the policy, although the loss of the eye—the loss of his sight—was hastened by external means, and although he would not have lost his sight at that time, and on the other hand the eye was sound within the meaning of the policy if he would not have lost his sight, but for the external, violent and accidental means. I repeat, that if you find from the evidence that the condition of the eye was such that he would ultimately have lost sight without the interference of external and accidental causes, though he would not have lost his sight at the time he did lose it, then he would not be sound physically and mentally within the meaning of the policy, although the loss of sight was hastened by external means, and although he would not have lost his sight at the time he did lose it, and on the

other hand, the eye was sound within the meaning of the policy if he would not have lost his sight, but for external, violent and accidental means." This charge might be upheld on the first issue, and is perhaps more favorable to the defendant on that issue than he could require. *Freeman v. Accident Asso.,* 156 Mass., 357; *Fetter v. Casualty Co.,* 174 Mo., 256.

But on the third issue we are of opinion that the charge is not in accord with the authorities. This issue involves the question as to whether the plaintiff, in representing himself to be sound physically and mentally, made a false statement on a matter material to the contract, and the charge, as we interpret it, means that to constitute the breach of his stipulation, so far as the eye is concerned, it must have been affected with a disease that would have in any event have destroyed the sight, and certainly involves the proposition that, to become material, a misrepresentation must be as to a defect which contributes in some way to the loss and damage for which the indemnity is claimed. But in the absence of some legislation, the term "material," in cases of this character, is not restricted in the way here suggested. In 16 Am. & Eng. Enc. (2 Ed.), 933, it is said that "Every fact untruly asserted or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in establishing the degree and character of the risk, or in fixing the rate of premium." To same effect is Vance on Insurance, 284.

Our statute on this subject, Revisal, vol. 2, sec. 4646, provides that "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties, nor shall any representation, unless material or fraudulent, prevent a recovery on the policy." This provision enters into and becomes a part of this and every policy issued and payable in

this State, and, where the term warranty is used, the statute operates and makes the same a representation, and one which avoids the policy only in case it is false and also fraudulent or material.

It will be noted that our statute does not undertake to define or limit the word "material." In several of the States the legislation is more specific and provides that a misrepresentation only avoids a policy when fraudulent or material to the risk. Even if our statute should be susceptible of this construction, it certainly does not go to the extent indicated in the charge that, to be material, the defect alleged must in some way have contributed to the loss for which indemnity is claimed.

While there was error in the charge on the third issue, we are of opinion that the verdict and judgment should not be disturbed on that account, for the reason that the response of the jury to the fifth issue establishes the plaintiff's right to recover—"that the defendant knew of the mental and physical condition of the plaintiff at the time the policy was issued." There is no error claimed in the charge of the judge below on this issue, and the only exception noted is that this issue was not raised by the pleadings. We agree with the trial judge that no reply was required in order to raise this issue. The answer of the defendant setting up a breach of warranty was by way of defense, and not as a counterclaim. In such case, the court in its discretion may direct a reply, but this is not positively required by the statute. Revisal, secs. 485 and 503. And in this last section it is provided: "But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in the reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require." The new matter in the answer being by way of defense and not a counter-claim, the statute therefore raised the issue. If the new matter, by way of avoidance, renders it desirable that a reply

be made, the judge may require one as stated. If it be under circumstances that take the party by surprise, the judge may and should order a continuance, but, here, the issue being raised by the statute, no harm was done, as all the witnesses to the transaction were in court, and no surprise or undue advantage was caused or suggested.

The fifth issue was then properly submitted, and having been answered in favor of the plaintiff, our authorities are decisive as to his right to recover the amount of the policy. There was evidence to the effect that the agent of the defendant was fully informed of the plaintiff's physical and mental condition, both as to the eye and the other unsoundness suggested.

In *Follette v. Accident Asso.,* 110 N. C., 377, it is held that "Where the local agent of an insurance company has actual knowledge of the falsity of a statement made by the insured in his application, and forwards the application upon which the policy is issued, the knowledge of the agent is the knowledge of the company, and the false statement will not avoid the contract."

In *Grabbs v. Insurance Co.,* 125 N. C., 389, it is held: "3. The knowledge of the local agent of an insurance company is in law the knowledge of the principal. Conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer, and such waiver may be presumed from the acts of the agent. 4. An implied waiver is in the nature of an estoppel *in pais* enforcible by a court of equity. An insurance company cannot be permitted to knowingly issue a worthless policy upon a valuable consideration." To like effect is *Continental Insurance Co. v. Pearce,* 39 Kansas, 396; *Dietz v. Insurance Co.,* 31 W. Va., 851, and *Bawdin v. Ins. Co.,* L. R. Q. B. Div., 2, p. 534. And this is the generally accepted doctrine, except under circumstances involving an element of fraud on the company, on the part of both the applicant and the agent, as

in *Sprinkle's case,* 124 N. C., 405; and there are no such circumstances shown to exist here.

There was evidence that the plaintiff informed the agent that this eye was cured and that the sight was not so good as it formerly was, but had healed from the first attack; and further, that the agent knew all about the eye and its condition. The agent denied this, but the jury have determined the matter for the plaintiff.

There is very little testimony of any other unsoundness—hardly enough for a jury to consider. It seems really to have amounted to this, that both the agent and the applicant were perhaps mistaken as to what kind or degree of unsoundness might have been regarded as material. But there was testimony to the effect that whatever unsoundness existed the agent of the company was fully informed of it, and there is no evidence of any such glaring misstatements as would permit the inference of actual fraud on the part of either the agent or the plaintiff. This being true, the authorities cited are conclusive and there is no error that requires a new trial.

We are not inadvertent to the clause in the policy which provides that "no notice or knowledge of the agent or any other person shall be held to effect a waiver or change in this contract or any part of it." * * * The effect of a clause of this kind has been very much discussed in the courts, and there is high authority for the position that to ignore such a stipulation would be to place an undue limitation on the right of contract, and to threaten the sanctity of written instruments by breaking down the rule that such contracts cannot be changed or varied by parol. But we think the great weight of authority, certainly in the State courts, favors the position that a clause of this character is ineffective for the purpose designed and that an insurance company shall not appoint an agent, use his services, accept the results of his work, and repudiate this essential and inherent feature of the law of agency, that a knowledge of the agent is the knowledge

of the company. As stated in *Sternnamen v. Insurance Co.*, 170 N. Y., 13: "While, as a general rule, parties have a right to make such contracts as they see fit, this right is restricted by legislation, by public policy and by the nature of things. They cannot stipulate that facts which the law declares establish a certain relation not only do not establish that relation, but establish directly the opposite." See also *Kansal v. Ins. Co.*, 31 Minn., 17; *Aetna Live Stock Co. v. Olmstead*, 21 Mich., 346; *Sternnaman v. Ins. Co., supra; Dietz v. Ins. Co., supra.* The principal is well stated by a recent writer on insurance as follows: "Again, a second incident of the relation of principal and agent is that any information material to the transaction, either possessed by the agent at the time of the transaction or acquired by him before its completion, is deemed to be the knowledge of the principal, at least so far as that transaction is concerned, even though in fact the knowledge is not communicated to the principal at all. It is here to be observed—and the importance of the principal is so great that it cannot be too strongly emphasized—that these incidents of agency are created by the law and not by the parties. The insurer is charged with the knowledge acquired by his agent in making or negotiating a contract of insurance, not because he has consented to be so charged, nor because he has authorized his agent so to bind him, but because, as a legal consequence of the relation he sustains to the agent, the latter's knowledge is imputed to him. It therefore follows that this incident, created by the law in response to the demands of public policy irrespective of agreement, cannot be destroyed or altered by the agreement of the parties. The parties cannot by their contract contravene the policy of the law in this instance any more than the husband, by contract, can escape his duty to support the wife, or the carrier can by contract exempt himself from liability for his negligent failure to carry safely his passenger. Those cases which ignore this principle and re-

gard these legal incidents conferred and subject to limitation, are much to be deplored." Vance, pp. 304 and 305. And this we hold to be the better doctrine.

There is no error and the judgment below is

Affirmed.

NELSON v. HUNTER.

(Filed March 20, 1906).

Slaves — Marriage — Offspring — Acts of 1866 and 1879— Evidence.

1. Upon the issue, "Is the plaintiff the legitimate child of J and S" (slaves), the question, "Did you ever hear S, after the surrender, say anything about going back to another wife," was properly excluded because it assumes the point in controversy—that S had another wife.

2. By virtue of the provisions of the Act of March 10, 1866, the relation of man and wife existing between former slaves, if continued until the passage of the act, culminated into a valid marriage and was legalized by the statute.

3. The Act of March 10, 1866, has a retroactive effect so as to legalize the relation from the beginning of it, thereby legitimatizing all of the offspring of the cohabitation born during the entire period, and conduct after the passage of the act could not render the offspring of the union illigitimate.

4. It was competent for the defendants to prove that after the war and prior to March 10, 1866, S returned to his former home and lived and cohabited with his former slave wife, but they could not prove this by general reputation.

5. The court properly excluded the following question: "What did S say then was the purpose he had in his mind at the time he married J, in regard to going back down the country as soon as he could, to live with his former wife?" as the law does not deal with what a person thinks, but what he does.

6. There are two essential conditions of the Act of 1879, to-wit: A cohabitation subsisting at the birth of the child and the paternity of the party from whom the property claimed is derived.

ACTION by Chas. S. Nelson against Priscilla Hunter, Administratrix of Jackie Nelson and others, heard by *Judge Chas. M. Cooke* and a jury, at the October Term, 1905, of the Superior Court of WAKE.

Action to recover from defendant, administratrix, the estate of Jackie Nelson, consisting of proceeds of sale of real estate. The following issue was submitted: Is the plaintiff the legitimate child of Jackie and Solomon Nelson? Answer: Yes. The court gave judgment for plaintiff and the defendants appealed.

S. G. Ryan for the plaintiff.
Peele & Maynard and *J. N. Holding* for the defendants.

BROWN, J. The plaintiff claims the property as the only legitimate child of Jackie Nelson. The defendants claim to share with plaintiff as the illegitimate children of Jackie, alleging that plaintiff is also illegitimate.

Solomon Nelson and Jackie Cook were slaves. There is evidence by plaintiff tending to show that Solomon and Jackie lived together as man and wife during the war; that a marriage ceremony was then performed between them and that this relationship continued to exist at the date of the ratification of the Act of March 10, 1866, and was existing in 1867. There is no evidence that Jackie ever had any other husband than Solomon, and it is admitted that defendants are her illegitimate children, born during slavery and before the alleged cohabitation with Solomon began. There is evidence tending to prove that plaintiff was the only child of Solomon and Jackie and that he was born January 12, 1867. Solomon died before Jackie. There is evidence tending to prove that Solomon was brought to Wake County

by his owner in 1862, and that not long afterwards he and Jackie assumed the relationship of man and wife; that prior to 1862 he resided in Beaufort County, and for five or six years before the war had lived with a female slave named Viley.

The defendants undertook to show that the relation between Solomon and Jackie after the war was not exclusive, and that cohabitation after the war and at the time of the passage of the act had been resumed between Solomon and Viley. *Branch v. Walker,* 102 N. C., 34.

There are some exceptions to evidence by the appellants that were pressed with earnestness and argued with much ingenuity by their learned counsel, which we will notice.

The first exception relates to the following question: "Did you ever hear Solomon after the surrender say anything about going back to another wife?" This question was properly excluded. It is objectionable because it assumes the very point in controversy—that Solomon had another wife. However, any objection that may have existed to the court's ruling was removed when the same witness said: "I do not think I had any conversation with him (Solomon) in regard to his purpose in going down there or heard him say anything about it."

Second exception: "What was the reputation as to how Solomon and Viley had been living after he returned there (to Beaufort County) and before you went down there?" This question was addressed to witness, David Blount. The evidence of David Blount shows that he did not go to Beaufort County until 1867, and then he saw Solomon down there and he was not living with Viley. Before that time David was in Wake County and knew nothing of any relationship existing between Solomon and Viley prior to March 10, 1866. By virtue of the provisions of that act the relation of man and wife existing between Solomon and Jackie, if continued until the passage of the act, culminated into a valid marriage

and was legalized by the statute. The act has a retroactive effect so as to legalize the relation from the beginning of it, thereby legitimatizing all of the offspring of the cohabitation born during the entire period. If Solomon resumed his cohabitation with Viley after the passage of the Act of March 10, 1866, it could have no effect upon the legitimacy of his and Jackie's children. If his relations with Jackie continued long enough to have become legalized by the act, his conduct after that could not render the offspring of that union illegitimate, for the act made it a legal relation *ab initio* and capable of transmitting inheritable blood.

The third and fourth exceptions are to the ruling of the court in refusing to allow defendants to prove a general reputation among the Blount negroes and Cook negroes as to whether or not Solomon had a wife living down the country. According to the evidence the Blount negroes were brought to Wake County during the war and the Cook negroes resided there at the home of their owner. If it were competent to prove by reputation such a relationship it must be the reputation in the community where the parties had lived and not the reputation which obtained among the Blount negroes and from whom the Cook negroes had probably heard it. Moreover, if Solomon had left a slave wife in Beaufort County at the beginning of the war, when he was removed to Wake County, it could have no effect upon his relationship with Jackie. It was no bar to his forming a new and exclusive cohabitation with her. There were no legal marriages among slaves and they frequently formed new relations when moved from one place to another. It was competent for the defendants to prove, if they could, that after the war and prior to March 10, 1866, Solomon returned to Beaufort County and lived and cohabited with his former slave wife, Viley, but they could not prove this by mere reputation. The authorities relative to proving a marriage by general reputation have no application. The defendants did not contend that there

was an actual marriage between Solomon and Viley after the war. They only proposed to prove that they had resumed after the war the relation that had existed between them before the war, and that, therefore, the relation with Jackie had terminated before 1866, or was not exclusive at the time of the passage of the act. At that time Solomon and Viley were no longer slaves. They could have contracted a legal marriage. If, then, they entered into an illegal relation and lived as man and wife, it constituted fornication and adultery, and this could not be proved by general reputation.

The fifth exception is to the refusal of the court to allow the following question: "What did Solomon say then was the purpose he had in his mind at the time he married Jackie in regard to going back down the country as soon as he could to live with his former wife?" The sixth, ninth, tenth and eleventh exceptions relate to similar questions and rulings. We think His Honor properly excluded the questions. What Solomon's feelings and purposes were at the time he first made love to Jackie can throw no light on what he actually did some years after. Jackie may have so won his heart that perhaps he forgot all about the charms of Viley. The law does not deal with what a person thinks, but with what he does—his acts—hence what Solomon "had in his mind," whether he intended from the beginning to play Jackie false, is not competent evidence.

The seventh and eighth exceptions to the evidence are untenable and need no discussion.

The court very correctly applied the law in the following paragraphs of the charge, which were excepted to by the defendants: (7) The court instructs the jury that if they shall find that Solomon Nelson and Jackie Cook or Nelson commenced to live together as husband and wife while they were slaves and continued to so live exclusively (as the court has explained to you) until their emancipation, and after

that until the plaintiff, Charles Nelson, was born; and if they shall further find that Charles was born before January 1, 1868, then Charles would be a legitimate child of Jackie, and they should answer the issue yes, although the jury might find that after the birth of the said Charles the said Solomon left the said Jackie, or that he was after that living and cohabiting with another woman and they were living together as man and wife. (8) If the jury shall find that this said relation as of husband and wife, and exclusive in its character, was commenced between Solomon and Jackie while they were slaves and so continued to and including the 10th of March, 1866, then the court instructs the jury that the said Solomon and Jackie were husband and wife from the date of the commencement of their living together as man and wife, and the said Charles would be a legitimate child, whether born before or after January 1, 1868, and the jury should answer the issue yes.

There is abundant evidence establishing the legitimacy of plaintiff under the provisions of either of the Acts of 1866 or 1879, if credited by the jury. In *Woodard v. Blue,* 103 N. C., 116, *Chief Justice Smith* says there are two essential conditions of the Act of 1879, "a cohabitation subsisting at the birth of the child, and the paternity of the party from whom the property claimed is derived." Under the Act of 1866 the conditions are cohabitation as man and wife between former slaves and its continuance until the ratification of the act. This court, in construing both acts, declares that their provisions were intended to apply for the benefit of those who occupied such relations to each other exclusively and not to others at the same time. *Branch v. Walker, supra.* In this case the parentage of the plaintiff is not disputed, but if it was, all the evidence establishes it. There is also abundant evidence to go to the jury that the relation of man and wife existed between plaintiff's parents during the war and continued until after plaintiff's birth and until after

March 10, 1866, and there is also evidence that plaintiff was born in 1867. Thus the evidence offered by plaintiff meets the requirements of both acts. As to the exclusiveness of the relation between Solomon and Jackie, we do not find any evidence in the record tending to prove that Solomon, during the same period, had entered into a similar relation with any other woman than plaintiff's mother.

The charge of the court has been examined by us with care. It is a clear, comprehensive, accurate and fair presentation of the case to the jury. We find no error in it. To comment upon each of the many exceptions to it would unduly lengthen this opinion. It is sufficient to say that we have given due consideration to them and find them without merit. The special purpose of the legislation of 1866 and 1879 was to provide against the evil of universal illegitimacy of slave children consequent upon the inability of slaves to enter into the marriage contract. The law may have worked a hardship upon these defendants, who were born of the same mother as plaintiff, and who, but for these statutes, would share equally with him in the property of the mother. But doubtless there are innumerable other cases where the result has been such as to justify the wisdom of their enactment.

Affirmed.

BEASLEY v. SURLES.

(Filed March 20, 1906).

Warranty—Practice—Issues—Evidence—Question for Jury.

1. In an action on a note given for the purchase price of a horse, where defendant admitted the execution of the note and by way of counterclaim alleged a warranty and breach thereof, and at the close of the evidence, the court intimated that it would charge the jury that there was no evidence of warranty, defendant was relieved of the duty of tendering an issue upon that question.

2. Rev., sec. 548, contemplates that the issues shall be drawn before the introduction of testimony.

3. In determining whether or not language used in connection with the sale of personal property constitutes a warranty, it is proper for the jury to consider the testimony in the light of the language used, the spirit in which the parties met and all of the other circumstances, and to find therefrom the intent with which the words were used by the seller and understood by the defendant, with proper instructions as to what constitutes warranty.

ACTION by C. M. Beasley against D. H. Surles, heard on appeal from a justice of the peace, by *Judge M. H. Justice* and a jury, at the September Term, 1905, of the Superior Court of JOHNSTON. From a judgment for the plaintiff, the defendant appealed.

Plaintiff brought suit against defendant on account of a note for one hundred and forty-five dollars executed by defendant, payable to plaintiff, consideration being the purchase of one mare. Defendant admitted the execution of the note and pleaded, by way of counterclaim and set off, that plaintiff warranted the horse to be sound and in good condition, when in fact said horse was not sound, etc. Plaintiff, after introducing the note, rested. Defendant was introduced and testified: "I went to the lot where the horse was—

plaintiff brought her out; her hips were skinned. I said 'she looks colicky.' He said he had known her ever since a colt and had never known her to be sick a day in her life. This was on Friday. I relied on his statement and bought her. Went back Monday, took her and gave note; had never seen her before. She lived three weeks and died of colic. Saw defendant next day and he said he would do what was right."

Plaintiff testified: "After some talk about buying the mare, defendant asked me if she was sound. I said I never had a thriftier horse since I had her. That Reaves said she had been sick from eating persimmons when Ennis had her. Told defendant when I got her."

There was evidence in regard to the condition of the horse, etc., which is immaterial upon the exceptions presented on the appeal.

Upon the conclusion of the testimony His Honor intimated that he would charge the jury that in no aspect of the case was there any evidence to be considered by the jury of warranty of the horse by plaintiff at the time of the sale or prior thereto. The following issues were thereupon drawn and tendered by defendant:

1. Was the horse sold by plaintiff to defendant unsound at the time of the sale? Yes.

2. Did the plaintiff represent the horse to be sound? Yes.

3. Did he at the time know or have good reason to believe that the horse was not sound? No.

4. How much damage is defendant entitled to recover for the unsoundness of said mare? Nothing.

Judgment for plaintiff. Exception and appeal by defendant.

Wellons & Morgan and *Murray Allen* for the plaintiff.

Pou & Brooks and *W. A. Stewart* for the defendant.

CONNOR, J., after stating the case: Defendant, by way of a counterclaim, alleged a warranty and breach thereof and deceit. At the close of the evidence, His Honor having intimated that he would instruct the jury, which he afterwards did, that there was no evidence of warranty, defendant's counsel did not tender an issue upon that question. Among the exceptions to the charge are the following: "1. That His Honor erred in refusing to submit to the jury an issue as to whether the plaintiff warranted the mare to the defendant in making the sale. 2. That His Honor erred in holding at the conclusion of the testimony in the case that there was no evidence of a warranty to be submitted to the jury. 3. That His Honor erred in charging the jury that there was not evidence of a warranty of the mare at the time of the sale by the plaintiff to the defendant. 4. That His Honor erred in failing to leave the question of warranty with proper instructions as to the law to the jury to find the facts as to whether the plaintiff intended to and did warrant the mare to the defendant at the time of the contract."

Plaintiff insists that the defendant having failed to tender an issue in regard to the warranty may not now urge His Honor's failure in that respect as error. While it does not very clearly appear in the record, it was stated on the argument and is in accordance with what we know to be the practice, that the issues were drawn at the conclusion of the testimony. Revisal, section 548, contemplates that the issues shall be drawn before the introduction of testimony. A custom has grown up in the courts of drawing the issues after the conclusion of the evidence. The plaintiff's contention, that the failure on the part of the defendant to tender an issue and except to His Honor's refusal is the orderly porcedure, is sustained by the authorities cited in his brief. We think, however, that His Honor having intimated that he would charge the jury that there was no evidence to sustain the allegation of the warranty, relieved the defendant of the duty of

tendering an issue upon that question. While it would have been entirely regular for him to have done so, we can see no reason why he may not present the exception to the charge as given by His Honor. We can well understand how counsel would hesitate to tender the issue in the light of the judge's declaration that he would charge the jury that there was no evidence to sustain it. It is evident from the case on appeal that His Honor did not understand that the defendant had waived the question, the exceptions being found in the case on appeal as settled by him. If the order in which the issues should have been tendered as provided by The Code, had been followed, the defendant would have tendered his issues and His Honor have ruled upon them, to which exception could have been noted. While we have no disposition to disregard or in any manner weaken the force of the rules of procedure which have been found conducive to the orderly administration of justice, we do not think they should be so construed as to unreasonably deprive parties of the right to present their controversies to this court. Upon examination of the case on appeal, we think that the defendant's exception is taken in proper time. The plaintiff, however, insists that His Honor's ruling is correct. It is often difficult to say whether or not language used in connection with the sale of personal property constitutes a warranty.

In *Horton v. Green*, 66 N. C., 596, an instruction that the jury were to consider the testimony in the light of the language used, the spirit in which the parties met and all of the other circumstances, and to say therefrom whether it was the seller's intention to indemnify the buyer from all damage which might arise from unsoundness of the property, was correct.

In *Baum v. Stevens*, 24 N. C., 411, *Ruffin, C. J.*, says: "It is certain that warrant is not an indispensable term in contracts respecting personalty, as it is in conveyances of freehold. It is also true that a representation simply of soundness, does not impart absolutely a stipulation of the

existence of that quality. But the representation may be made in such terms and under such circumstances, as to denote that it was not intended merely as a representation, but that it entered into the bargain itself. * * * The evidence may consist of everything which tends to establish that the vendor meant to convey the impression that he was binding himself for the soundness of the article, and that the vendee relied on what was passing as a stipulation. Among these circumstances, would, of course, be the understanding, at the time, of the bystanders, who witnessed the transaction, and the facts on which the impressions of those persons were founded." After further discussion, he concludes: "These, we think, were all matters properly belonging to the jury, to whom they should have been submitted, with instructions that, if they collected the defendant did not mean merely to express an opinion, but to assert positively that the negro was sound, and that bidders should, upon the faith of that assertion, bid for the negro as sound, then it would amount to a warranty, otherwise not."

In *McKinnon v. McIntosh,* 98 N. C., 89, *Davis, J.,* says: "If the vendor represents an article as possessing a value which upon proof it does not possess, he is liable as on warranty express or implied, although he may not have known such an affirmation to be false, if such representation was intended, not as a mere expression of opinion, but the positive assertion of a fact upon which the purchaser acts; and this is a question for the jury."

In the light of these authorities, we are of the opinion that His Honor should have submitted the question to the jury as to the intent with which the words were used by the plaintiff and understood by the defendant, with proper instructions as to what constitutes a warranty.

For the error in refusing to submit the question to the jury, there must be a

New Trial.

HOGGARD v. JORDAN.

(Filed March 27, 1906).

Election—Wills—Executors and Administrators—Estoppel.

Where a husband and wife owned a tract of land by entireties, and the husband died, leaving a will giving his wife a life estate in said tract and also in two stores and lot, and his entire personal estate valued at $200, and after her death the same property was given to their children, and the wife proved the will and qualified as executrix and took into her possession the personal estate and occupied the land for nine years until her death, such conduct was an election to claim under the will and her administrator, eight years after her death and against the consent of her real representatives, will not be permitted to make an election for her to claim against the will by simply filing a petition for the sale of said tract of land to make assets to pay her debts.

ACTION by John W. Hoggard, Administrator of Mary C. Jordan, against C. E. Jordan and others, heard by *Judge R. B. Peebles* and a jury, at the September Term, 1905, of the Superior Court of BERTIE.

This was a petition by the administrator of Mary C. Jordan, deceased, to sell land for the purpose of making assets with which to pay debts. The defendants are the devisees of Jesse N. Jordan, and heirs at law of his widow, Mary C. The petitioner alleged that his intestate, Mary C., died seized of the lands described in the petition. This was denied by defendants. The cause was, upon issue thus joined, transferred to the civil issue docket for trial. By consent, His Honor found the facts. On the 18th day of May, 1877, Mary C. Jordan, being the owner of a share of a tract of land, descended from her father, joined with her husband, Jesse N. Jordan, in a conveyance of said share to her sister, Florence Hancock, and her husband, R. E. Hancock. On the same day the said Florence and her husband joined in a conveyance of her interest in said land to the said Mary C., and her husband,

Jesse N. Jordan, who died during the month of October, 1887, leaving a last will and testament, nominating the said Mary C. executrix thereto. Item 1 of his will is in the following words: "I leave to my beloved wife, Mary Catherine, during her natural life, my entire personal property of every kind and description, to use as she may think best, together with all of my real estate, consisting of the Hancock tract of land, and the two stores and lots situated in Lewiston, to lease or rent, as she may think best for the interest of herself and younger children." He gave the same property upon the death of his wife to his children, who were also the children of his wife, Mary C. The value of the personal estate of said Jesse N. was, at the time of his death, two hundred dollars. The said Mary C. proved the will and qualified as executrix thereto, taking into her possession the personal estate and occupying the land until her death, during the month of March, 1896. She left no will. Petitioner qualified as her administrator, January 4, 1904. She was indebted in the sum of $75. His Honor, upon the foregoing facts, being of the opinion that the said Mary C. took under the will but a life estate in the lands, rendered judgment for defendants, to which plaintiff excepted and appealed.

Winston & Matthews for the plaintiff.
Day, Bell & Dunn and *J. B. Martin* for the defendants.

CONNOR, J., after stating the case: We had occasion to consider the general principle involved in this record in the case of *Tripp v. Nobles,* 136 N. C., 99, and upon a rehearing in 138 N. C., 747. The plaintiff insists that a distinction may be drawn between that case and the facts presented in this appeal; he also suggests that the very able dissenting opinion "is more in harmony with decisions and justice." It must be conceded that in some cases, there is an apparent hardship in the application of the well-settled doctrine of

election, but a careful examination of the numerous cases to be found in our own and the English courts show a solicitude on the part of the judges to so administer the doctrine that the rights of all persons interested shall be protected; decrees are so moulded, that, when possible, compensation is directed to be made and forfeitures of estates prevented. The doctrine of election between inconsistent dispositions of property in wills and other instruments is peculiarly of equitable origin, and its administration in the jurisdiction of courts of equity "by reason of the inflexible, inelastic and cramped procedure of the common law courts." An examination of the will of Jesse N. Jordan, made but a few months prior to his death, discloses a wise plan for the disposition of his estate, by which his widow is enabled to use both her own and his property "for the best interest of herself and younger children." To this end, he gives her a life estate in the Hancock land, to which it is not improbable he thought he was entitled to one-half, "two stores and lot in Lewiston, N. C.," and his entire personal estate. It will be noted that, at the time of his death, four of his children were under fourteen years of age, and all were minors. At her death he gives to each child a share in the property. It was stated on the argument that, she, for some reason, did not get the stores. We are concluded in this respect by the record—the petition states that she died seized of the Hancock land and "two stores and lot situate in Lewiston, N. C." His personal estate was worth but two hundred dollars, to all of which she would have been entitled as her year's support. There is nothing in the record to show the value of the land or the stores, nor that the latter did not belong to the testator. We are of the opinion that upon the facts found, Mrs. Jordan was put to her election, either to claim under the will as a whole, or to claim against it, surrendering any other than her dower right in the stores, and her year's support in the personalty. She knew the contents of the will—proved it and qualified as

executrix, remained in possession of the property, until her death in 1896, and her children went into possession under the will. Thus for nine years she, by her conduct in proving the will and qualifying and by using the property, acquiesced in the disposition made by her husband. For eight years since her death, the only persons who could have been benefited by electing to take as her heirs, and against the will, have likewise acquiesced in it. Certainly, after so long acquiescence in the provisions of the will, her administrator, against the consent of her real representatives, will not be permitted to make an election for her by simply filing a petition for the sale of the land. Her conduct brings the case clearly within the observation of *Lord Hardwicke,* in *Tomkins v. Ladbroke,* 2 Vesey, Chan., 593, that the courts will not "disturb things long acquiesced in by families upon the foot of rights, which those in whose place they stand, never called in question." The *Vice Chancellor,* in *Dewar v. Maitland,* L. R. E., 2 Eq., 834, said: "Although the court compels persons to elect, yet election itself is a voluntary act. The doctrine has been established for the peace of families and of the public, that if property has been long enjoyed according to a certain mode and rights, this court will be very slow to disturb such enjoyment. The heir in this case chose to enjoy the property devised by his father—whether properly devised or not—upon the footing of his will." In *Worthington v. Wigginton,* 20 Blav., 67, the question was discussed by *Sir John Romilly,* M. R., saying: "Two things are essential to constitute a settled and concluded election by any person who takes an interest under a will, which disposes of property under that will. There must be, in the first place, clear proof that the person put to his election was aware of the nature and extent of his rights; and in the second place, it must be shown that, having that knowledge, he intended to elect. In this case, I think that the widow was aware of what her rights were; she was fully aware of the contents of her husband's

will, she was the sole executrix named in it and had proved it; and she had made use of her character of executrix to enforce payment of money due to her late husband and to arrange with the landlord for the surrender of the five leaseholds. She must, therefore, on the one hand, have known that her husband had, by his will, specifically bequeathed the stock standing in their joint names, and that by it he gave her only a life interest in that stock. * * * She knew that the will disposed of her property, she knew that she could withdraw it from the operation of the will."

The discussion and review of the authorities are full and exhaustive. In *Adset v. Adset,* 2 John, Ch. 448, *Chancellor Kent* said: "Taking possession of property under a will or other instrument and exercising unequivocal acts of ownership over it for a long time, will amount to a binding election." *Penn v. Gugginheimer,* 76 Va., 839; Pom. Eq., 513; Fetter Eq. 56. We have discussed the question upon the theory that the widow in her life time, or her heirs at law at her death, were seeking to claim her land devised by Jesse N. Jordan. It would seem that, if such were the case, they would, under the circumstances, be held to have elected to claim under the will after the unequivocal acts of ownership and long acquiescence in the disposition made by her husband. However this might be, we are unable to perceive how, in the light of the facts appearing in the record, where all of the parties interested, or who, if no disposition had been made of the land by the husband, would have been interested, are still acquiescing in and claiming under the will, the administrator of Mrs. Jordan can treat the election to claim against the will, as having been made, and subject the land to sale. It is conceded that the only purpose in seeking to sell the land is to pay a debt contracted by Mrs. Jordan after the death of her husband. She was certainly under no legal or moral obligation to the creditor to dissent from her husband's will or elect to take against it. The status of her property was

a matter of record when the debt was contracted, and no question raised until eight years after her death. The children, it is to be presumed, upon the death of Mrs. Jordan, took possession of the land under their father's will. It is difficult to see how, against their consent, a court, in a statutory proceeding, having no equitable element in it, can proceed to sell the land. If sold for a price in excess of the debt, to whom and in what right would the excess be paid? Certainly if the land is sold, as her property, the excess, after paying the debt, should be paid to her heirs and not the devisees of her husband. There can be no partial election to claim against the will. It is well settled that the election, when made, must be complete and final. Rights of property and family settlements made with the consent of husband and wife, or, at least, acquiesced in by the survivor, would be insecure, if, after so many years, they could be disturbed in this summary method. To the suggestion that Mrs. Jordan made no will, it would seem an answer that she acquiesced in the disposition of her land made by her husband. As we have said in *Tripp v. Nobles, supra,* the creditor cannot reasonably complain; he extended credit with the condition of the title disclosed on the records. Whether Mrs. Jordan preferred to abide by the will of her husband and take the two hundred dollars in personalty under the will by reason of an arrangement made between them, or out of respect to his wishes, or for any other reason, is not material. She, by her conduct, showed that she was content with the disposition of her property; and his will, approved by her, should not now be disturbed. To do so would not "be in harmony with decisions and justice."

We have given the case a careful consideration and re-examined the authorities and find no reason for disturbing the decisions heretofore made by us. It may be proper to say that all of the authorities disclose a purpose to give to the widow, claiming dower in land devised to her, the largest possible latitude, both in regard to the construction of the will and the

time within which she is required to elect. As said by *Romilly, V. C.*, in *Worthington v. Wigginton, supra,* "the cases relative to dower have no application to the present." The judgment of the court below must be

Affirmed.

WALKER, J., concurring in result: This case is not like *Tripp v. Nobles,* 136 N. C., 99. Here there was a substantial benefit conferred by the will, which forced the plaintiff's intestate to choose between the acceptance of that benefit and the retention of the property, already her own, which is attempted to be disposed of by the same instrument. There was no such benefit received under the will construed in *Tripp v. Nobles.* It would seem but just to require that the benefit bestowed should be a substantial one, in order to put the donee to an election, and that it should not consist merely of property which he would have received under the law, if the will had not been made. Further investigation confirms me in the view entertained and stated in my dissenting opinion in that case. The principle was adopted and applied in *Tyler v. Wheeler,* 160 Mass., 206, where it was held that an executor is not estopped by qualifying under the will of his wife to claim his legal interest in her estate, and in *Register v. Hensley,* 70 Mo., 189, the court decided that a widow's renunciation of the provisions of her husband's will, made in lieu of dower, was not invalidated by her not surrendering personal property, which she had previously received under the will, where the amount was the same as that which she would receive under the administration law. The case of *Loring v. Craft,* 16 Ind., 110, also sustains the same view, as the court held that a surviving wife is entitled to the statutory provision of $300 "notwithstanding she may have accepted the provisions made for her by the will of her husband." *Correll v. Ham,* 2 Iowa, 552; *Wilbur v. Wilbur,* 52 Wis., 298. The language used in *Fitts v. Cook,* 59 Mass. (5 Cush.), 601,

seems to fit the case: "In looking at the provisions of this will," the court said, "it will be seen that they are so little a departure from what would have been the legal rights of Joanna Cook without the will, that little can be inferred from the subsequent use of the property in the manner set forth in the agreed statement." The court then held that there was no binding election or estoppel. The law is thus stated in Bigelow on Estoppel, 676: "This doctrine of election is never applied in the law of wills when, if an election is made contrary to the will, the interest which would pass from the testator by the will cannot be laid hold of in equity to compensate the disappointed donee. Some free disposable property must be given to the electing donee which can become compensation for what the testator sought to take away."

It was held in *In re Gwyn,* 77 Cal., 313, that "a widow is not estopped to make an election to take under the law by causing the will of her husband to be probated and by becoming executrix thereof." To the same effect is *Estate of Frey,* 52 Cal., 658. The court decided in *Collier v. Collier,* 3 Ohio St., 369, that "a widow electing to take under a will, containing provisions for her, expressed to be in lieu of dower and all other claims on the estate of the testator, is not barred of her right to the year's support, provided by law, from the estate of the debtor." So it was held in *Taylor v. Browne,* 2 Leigh (Va.), 454, that by taking administration with the will annexed, the widow will not be held to have elected to claim under the will instead of under a deed of settlement, formerly made by her husband for her use and benefit and which contained a disposition of the property different from, and more beneficial to her than the provisions of the will. Taking under the will, says the court in *Hubbard v. Russell,* 73 Ala., 578, will not deprive the widow of her exemption of one thousand dollars allowed her by the law, for she substantially and practically takes what already belongs to her.

Election being a matter of equitable cognizance, the ordi-

nary principles of equity must apply, one of which is that the court will never decree anything to be done which is plainly unfair, oppressive or unconscientious, especially when the rights of others will not be materially affected by a refusal to do so. It also regards more the substance than the mere form of things. The authorities, it seems to me, clearly establish that the widow's year's provision, or any other interest created by the law and independent of the disposition of the husband, cannot be considered as a bounty conferred, and therefore no election can arise in such a case. It would appear to be against equity so to hold. The proving of her husband's will by her as executrix, under such circumstances, should not therefore put her to an election. There is not in such a case a single equitable element to support an estoppel, and it is so held in the other States, and I think in decisions of this court, as I have shown in my former opinion. The cases in our reports, which are relied on in *Tripp v. Nobles,* to show the contrary, are clearly distinguishable from that case. In *Tripp v. Nobles* it appeared that the intestate could take nothing under the will which was not already hers by force of the law. The testator therefore had no free, disposable property to give her, and whether he has or not is the test by which to determine whether a case of election is presented.

Upon the doctrine of compensation, I will add to the authorities cited in my dissenting opinion in *Tripp v. Nobles,* the following: In *Bell v. Culpepper,* 19 N. C., 20, this court, by *Gaston, J.*, said: "The rule of election, in the sense in which it is insisted on by the defendant, is confined exclusively to courts exercising equitable jurisdiction, which have it in their power to restrain men from the unconscientious assertion of acknowledged legal rights. They hold that it is against conscience for a man to take a benefit under a will or other instrument, and at the same time disappoint other plain provisions of that will, made in favor of third persons. Of course he may keep, if he pleases, what was before his own;

for the mistake of the donor cannot take away his property; but if he will insist on enjoying the interest given him by the instrument, they will by proper decree provide that so enjoying it he shall give effect as far as he can to the other provisions of the instrument." And in *Alston v. Hamlin,* 19 N. C., 124, this court, by the same judge, said: "If the defendant can avail himself of the implied election which was insisted on at the trial, it must be before a tribunal competent to decide upon the equity of such election. The principle of election, as here asserted, is a principle of equity, proceeding on the doctrine of an implied condition, of which a court of equity in a proper case will enforce the performance by compelling the legatee, if he elects to take the bequest, to make compensation out of his own property to the disappointed legatees."

It does not appear in the case at bar what is the value of the land, nor what is the value of the "Lewiston lots," so that the principle of compensation could not be applied, even if there had not been a binding election to take under the will but an election had been so made as to call for the application of that principle, and even if equitable relief can be administered in this statutory proceeding and by the court where it originated. *Vance v. Vance,* 118 N. C., 864.

While I differed from the majority of the court in the case of *Tripp v. Nobles,* as to the questions of estoppel and election involved, yet having fully stated what, in my opinion, is the correct principle of law, as it should have been declared and applied to the facts, henceforth that decision shall be the law with me, for it may be right, though the conclusion reached by the court, I must think, and this is said with the utmost deference, is not supported by the best precedents or by the weight of authority.

WEST v. RAILROAD.

(Filed March 27, 1906).

Parties—Amendments—Practice—Estate by Entireties.

1. Where an objection for defect of parties was made below and overruled, this court will not exercise its discretionary power of amendment to destroy an exception duly taken below.

2. In an action brought by the husband alone for damages to land which had been conveyed to the husband and wife and which they held by entireties, the wife was not a necessary party.

3. The husband is entitled during coverture to the full control and the usufruct of land held by entireties to the exclusion of the wife.

ACTION by W. A. West against Aberdeen & Rock Fish Railroad Co., heard by *Judge Fred Moore* and a jury, at the November Term, 1905, of the Superior Court of CUMBERLAND. From the judgment rendered, defendant appealed.

H. L. Cook and *Sinclair & Dye* for the plaintiff.
Robinson & Shaw for the defendant.

CLARK, C. J. This is an action brought by the husband alone for damages sustained from fire by the woods on land which had been conveyed to the husband and wife, and which they held consequently by entireties. The plaintiff moved to amend in this court by making his wife a party. The Revisal, section 1545 and rule 26 of this court, recognize that such power can be exercised in this court "to amend by making proper parties to any case where the court may deem it necessary and proper," and indeed this court could amend without the statute. *Horton v. Green*, 104 N. C., 400; *Herndon v. Ins. Co.*, 111 N. C., 385. But here the objection for defect of parties was made below and overruled, and this court will

not exercise its discretionary power of amendment to destroy an exception duly taken below. *Grant v. Rogers,* 94 N. C., 755; *Wilson v. Pearson,* 102 N. C., 290.

Upon the point presented we are of the opinion that the wife was not a necessary party. It was so held as to an action of ejectment. *Topping v. Sadler,* 50 N. C., 359. In *Long v. Barnes,* 87 N. C., 333, it is held that the Constitution, Article X, section 6, as to the rights of married women, did not "destroy or change the *properties* and *incidents* belonging to the estates" held by entireties. In *Simonton v. Cornelius,* 98 N. C., 437, it is said: "So, too, the fruits accruing during their joint lives would belong to the husband" after separation from the land; though neither husband nor wife during the joint lives can convey or encumber the estate without the assent of the other, nor can a lien be acquired on it without such assent, nor can it be sold under execution. *Bruce v. Nicholson,* 109 N. C., 204; 11 Am. & Eng. Enc. (2 Ed.), 49. The Act of 1784, Revisal, section 1579, abolishing survivorship in joint tenancies, does not apply to estates by entireties. *Phillips v. Hodges,* 109 N. C., 250.

"But while at common law neither the husband nor the wife can deal with the estate apart from the other, or has any interest which can be subjected by creditors so as to affect the right of the survivor, yet subject to this limitation the husband has the rights in it which are incident to his own property. * * * He is entitled during the coverture to the full control and the usufruct of the land to the exclusion of the wife." 15 Am. & Eng. Enc. (2 Ed.), 849, and cases cited in note 2—among them *Pray v. Stebbins* (Mass.), 55 Am. Rep., 462; *Den v. Gardner* (N. J.), 45 Am. Dec., 388; *Hiles v. Fisher* (N. Y.), 53 Am. St., 762. As to personalty the same rule applies, and where shares of stock stand in the joint names of husband and wife he is entitled to the dividends during their joint lives. 15 Am. & Eng. Enc. (2 Ed.), 851; *Bramberry's Estate* (Pa.), 36 Am. St., 64. These are the inci-

dents and properties of an estate by entirety when (as in this State) there has been no change by statute, and upon the above authorities the plaintiff can maintain this action without joining the wife. She is not entitled to sue for this damage nor to share in the recovery. If any change in the incidents and properties of this anomalous estate is desirable, legislation must be had upon it.

The other exceptions require no discussion. The charge of the court was fair and guarded. *Phillips v. Railroad,* 138 N. C., 12. The prayer of the defendant, so far as it was entitled to it, was substantially given in the charge. It was proper to give the instruction quoted from *Black v. Railroad,* 115 N. C., 669, and the plaintiff was a competent witness as to the amount of damages he had sustained.

We do not pass upon the motion to dismiss for failure to comply with rules 19 and 28, as intimated in *Sigman v. Railroad,* 135 N. C., 181; *Hicks v. Kenan,* 139 N. C., 338. Those rules have been amended and made so plain in the revised Rules, printed at the end of this volume, that we feel sure that appellants will not misconceive the requirements and will henceforward take pleasure in observing them.

No Error.

WILLIAMS v. RAILROAD.

(Filed March 27, 1906).

Railroads—Fires—Negligence—Opinion by the Judge—Evidence.

1. A prayer to charge that "even if the fire was communicated to the defendant's right-of-way, the plaintiff cannot recover, for the engine was in good repair and equipped with an improved spark arrester for preventing the escape of sparks, and was managed and operated in a careful manner by a skillful and competent engineer, and the evidence as to this is uncontroverted and uncontradicted," was properly refused because it would have been an expression of opinion upon the facts, forbidden by Revisal, section 535.

2. If fire escapes from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right-of-way, the defendant is not liable, for there is no negligence.

3. If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right-of-way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable.

4. If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, and the fire catches off the right-of-way, the defendant is liable.

5. In an action for damages for negligently setting fire to plaintiff's woods by sparks from defendant's engine, evidence that the right-of-way was foul and the discovery of the fire on the right-of-way 30 minutes after defendant's train passed, was sufficient to submit the question to the jury.

ACTION by W. H. Williams against the Atlantic Coast Line Railroad Co., heard by *Judge W. R. Allen* and a jury, at the November Term, 1905, of the Superior Court of DUPLIN. From a judgment for the plaintiff, the defendant appealed.

Rountree & Carr and *Carlton & Williams* for the plaintiff.
Junius Davis and *H. L. Stevens* for the defendant.

CLARK, C. J. This action is for the recovery of damages for negligently setting fire to and burning the woods of the plaintiff by sparks from an engine falling upon a foul right-of-way. The errors assigned are: 1. Refusal to nonsuit. 2. That there was no evidence that the fire originated from the defendant's engine. 3. Refusal to charge that "even if the fire was communicated to the defendant's right-of-way, the plaintiff cannot recover, for the engine was in good repair and equipped with an improved spark arrester for preventing the escape of sparks, and was managed and operated in a careful manner by a skillful and competent engineer, and the evidence as to this is uncontroverted and uncontradicted."

This prayer was properly refused because it would have been an expression of opinion upon the facts, forbidden by the Act of 1796. Revisal, section 535. Though a witness may be uncontradicted, it is for the jury to say whether they believe him. The judge is prohibited from expressing an opinion that "a fact is fully or sufficiently proved, such matter being the true office and province of the jury." Revisal, section 535. Besides, though the fact were found by the jury that the fire was not set out by a defective engine, the legal conclusion in the prayer is incorrect, if the fire began on a foul right-of-way. The rules of negligence applicable to cases of this kind are:

1. If fire escapes from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right-of-way, the defendant is not liable, for there is no negligence.

2. If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right-of-way, which is in a foul and negligent condition, and thence spreads to the plaintiff's

premises, the defendant is liable. *Moore v. Railroad,* 124 N. C., 341; *Phillips v. Railroad,* 138 N. C., 12.

3. If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, and the fire catches off the right-of-way, the defendant is liable.

In the first case there would be, as above stated, no negligence. In the second the foul right-of-way would be negligence, and in the third the defective engine or spark arrester, or the negligent operation of a good engine, would be negligence.

The other two exceptions of the defendant amount simply to a claim that there was no evidence that the fire proceeded from the defendant's engine. No one testified that he saw the sparks fall from the engine upon the right-of-way. It is rarely that this can be shown by eye-witnesses, for it would usually happen that if the sparks were seen at the moment of falling and igniting the stubble, the fire would be put out by the observer. But here the fire was seen on the right-of-way, it burnt along the track between the ditch and the ends of the ties, and thence had gone into the woods. The wind was blowing from the northwest across the track, the fire being on the south side. Two witnesses testified that they first saw the smoke about 30 minutes after the defendant's engine passed. How long before that the fire began no one knew, but there was no fire before the engine passed. The other witnesses first saw the fire after a longer interval, and there was evidence that the fire burnt both ways. These were matters for the jury. The evidence was plenary that the right-of-way was foul, with much combustible matter on it, bushes having been cut down and allowed to lie. Indeed the fact that the right-of-way was burned over is evidence of combustible matter thereon, and the section master stated in his testimony that it was not kept cleaned off.

In *McMillan v. Railroad,* 126 N. C., 726, it is said that "No spark arrester can be so constructed as to entirely prevent the emission of sparks without destroying the efficiency of the engine, and while it is not negligence in the defendant to run such an engine over its road, the fact that it had recently passed over the road and fire was found there, was some evidence tending to show that it emitted sparks that set the grass on fire." The evidence of the negligent and foul condition of the track and the discovery of the fire so soon after the defendant's train passed, was sufficient to submit the question to the triers of the facts. The court was not authorized to draw the inferences of fact from this testimony.

In *Armstrong v. Railroad,* 130 N. C., 66, there was no evidence that the fire originated upon the right-of-way, or that connected it with the engine in any way. In *Ice Co. v. Railroad,* 126 N. C., 797, there was no evidence that the engine was defective nor that the right-of-way was foul. In *Cheek v. Lumber Co.,* 134 N. C., 225, there was no spark arrester, but on the conflicting evidence whether sparks from the engine caused the fire, the jury found that they did not.

It was the plaintiff's right to have this case submitted to the jury. Though we know that the words *judicium parium suorum,* in *Magna Carta,* chapter 39, did not either create or guarantee the right of trial by jury (as at one time was erroneously thought), McKechnie *Magna Carta,* 452, trial by jury having been instituted after that time, still in the process of time and the evolution of law, it has become a part of the "law of the land." The Constitution of the State, Article I, section 19, guarantees it as a "sacred and inviolable" right in civil cases, and section 13 of the same article guarantees the same right in criminal actions. We know that the failure to insert a similar guarantee in the Constitution of the United States was one of the chief grounds of objection to its ratification, an objection which was only cured by an understanding that amendments guaranteeing the right of trial by jury in

the Federal Courts should be adopted, which was done by the First Congress, and being promptly ratified by the States, they now constitute the Sixth and Seventh Amendments.

A right so guaranteed should not be denied, unless it is clear that there is no evidence. As was said in *State v. Kiger,* 115 N. C., 751: "If the presiding judge deems that the verdict is against the weight of the evidence, or that the evidence was insufficient in his judgment to justify conviction, he is vested with the power to set aside the verdict and grant a new trial. This is a matter of discretion, and his granting or refusing a new trial on such ground is not subject to review here. The fact that the twelve men have convicted on the evidence will often and properly make him less sure of his own opinion to the contrary." This case has been repeatedly cited with approval.

In *State v. Chancy,* 110 N. C., at p. 508, *Shepherd, J.,* says: "In some jurisdictions it has been held that if the testimony be such that the judge would set the verdict aside as being against the weight of the evidence, it should not be submitted to the jury; but this, according to our decisions, would be an usurpation of the functions of that body," citing *State v. Allen,* 48 N. C., 257; *Wittkowsky v. Wasson,* 71 N. C., 451, and then adds, "perhaps what is 'reasonably sufficient' evidence, as understood in North Carolina, is best stated by *Battle, J.,* in *Jordan v. Lassiter,* 51 N. C., 131. He says that if the circumstances 'be such as to raise more than a mere conjecture, the judge cannot pronounce upon their sufficiency to establish the fact, but must leave them to be weighed by the jury, whose exclusive province it is to decide upon the effect of the testimony.'"

No more subtle and adroit application could be addressed to a trial judge than a motion of this kind with its necessary implication that the jury may do wrong and injustice, and that the superior intelligence and greater impartiality of the judge are invoked to prevent it. But the experience and the wis-

dom of the ages and the deliberate judgment of the people, as embodied in the Constitutions of both the State and the Union, are conclusive that in passing upon the facts the opinion of one man, though skilled in the law, is not deemed superior to that of twelve men of the vicinage, but is held to be decidedly inferior and to be guarded against—so much so that the guarantee of a trial by jury in both civil and criminal cases is placed in the organic law which every judge is sworn to observe before he is permitted to discharge his functions.

No Error.

BLAND v. BEASLEY.

(Filed March 27, 1906).

Boundaries—Evidence of Common Reputation—When Competent—Evidence.

1. To justify the admission of evidence of common reputation on questions of private boundary, the time at which this reputation had its origin should be a comparatively remote period and always *ante litem motam* and should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location.

2 For the purpose of locating a certain line it was error to permit a witness to testify that he knew the line was the line in question from "what people said," where it appeared that his knowledge grew out of a survey made less than seventeen years before action brought, and the only person he ever heard say so was a person who was alive and a witness in the case.

ACTION by J. T. Bland and another against L. A. Beasley and others, heard by *Judge W. B. Councill* and a jury, at the September Term, 1905, of the Superior Court of PENDER.

The plaintiffs derive title by mesne conveyances under a

grant from the State to William and James Hall, dated December 22, 1819. The question at issue was one chiefly of boundary and depended to a great extent on the correct location of this grant. The description was said to begin on "a pine, Abram Hall's corner." As an aid to the true location of this corner, the plaintiffs put in evidence a grant to Abram Hall, dated May, 1816, which was said to "begin at a pine on Halsey's line," and as a further circumstance tending to show that the beginning corner of his grant was located as claimed by the plaintiffs, it became material, certainly relevant, to show that the beginning corner of this Abram Hall grant was at a pine in "Halsey's line," and in this way the existence and correct placing of this "Halsey line" became relevant.

For that purpose the surveyor (Colvin) in the course of his examination by the plaintiffs, was asked: "Q. Do you know where the Halsey line is? A. I only know what people say. Q. What indicates the Halsey line on the map? A. The line A D K—43—42, and from 42 back to A. Q. Did you ever run that patent except in 1884? A. No. Q. How long have you known that line by general reputation as the Halsey line? A. Since 1884. The eastern end of the line is at A. The western end is at K." To all and each of these questions and answers, except the first, the defendants excepted.

On cross-examination, touching this Abram Hall patent and Halsey line, the same witness made answer to questions as follows: "Q. Who first told you, since the survey began, that that was the Halsey line from 30 to the ditch branch, and from A to K? A. All I know is from the survey. Q. You say Jim Cowan is the only man you ever heard say that was the Halsey line? A. Yes." Jim Cowan was living and a witness in the case. The defendants then moved to strike out the testimony of this witness as to reputation of the location of the Halsey line. The motion was denied and the defendants excepted. The evidence was admitted as substantive evi-

dence on the location of the Halsey line. Verdict and judgment for the plaintiffs, and the defendants excepted and appealed.

Jas. O. Carr, J. D. Kerr and *E. K. Bryan* for the plaintiffs.

Stevens, Beasley & Weeks and *Shepherd & Shepherd* for the defendants.

HOKE, J., after stating the case: The correct placing of the Halsey line was a fact pertinent to the issue, but if the plaintiffs considered this material to the case, they should have established it by proper testimony. It is contended by the plaintiffs that common reputation is admissible on questions of boundary, that the testimony above set out is of that character, and the rulings of the court concerning it can be sustained on that ground. It is true that evidence of both hearsay and common reputation is received with us in cases of disputed private boundary, but this is an exception to the general rule, which requires that the rights of litigants must be determined on sworn testimony. Such testimony, in England, is not admitted in questions of private right, and the principle was only adopted here from necessity, and where, from lapse of time or changing conditions, it has become "difficult, if not impossible," that better evidence should be had.

Speaking of such testimony (hearsay) in *Sasser v. Herring,* 14 N. C., 342, *Henderson, J.,* says: "It is the well established law in this State. And if the propriety of the rule was now *res integra,* perhaps the necessity of the case, arising from the situation of our country, and the want of self-evident termini of our lands, would require its adoption. For although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity, we have in this instance sacrificed the principles upon which the rules of evidence are founded."

While such testimony is thus received of necessity, it should be confined to the reasonable requirements of the necessity that called it forth, and the rules and limitations for safeguarding its application should be carefully observed.

In *Hemphill v. Hemphill,* 138 N. C., 504, the court, in speaking of this character of evidence, said: "It is the law of this State that under certain restrictions, both hearsay evidence and common reputation are admissible on questions of private boundary"—citing *Sasser v. Herring,* 14 N. C., 340; *Shaffer v. Gaynor,* 117 N. C., 15, and *Yow v. Hamilton,* 136 N. C., 357. And in the same opinion, speaking of the restrictions placed upon evidence of common reputation, the court said: "This reputation, whether by parol or otherwise, should have its origin at a time comparatively remote and always *ante litem motam.* Second, it should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location"—citing *Tate v. Southard,* 8 N. C., 45; *Dobson v. Finley,* 53 N. C., 496; *Mendenhall v. Cassells,* 20 N. C., 43; *Westfelt v. Adams,* 131 N. C., 379, and *Shaffer v. Gaynor,* 117 N. C., 15.

Applying the principles set forth in these cases, we are of the opinion that the testimony of the witness Colvin on the matter in question does not comply with the conditions required for its reception. Here, the true location of the Halsey line had become a relevant circumstance, and granting for the present that the statement of this witness amounts to evidence of common reputation, this line, as shown by the plat, was one boundary line of a large tract of land lying adjacent to the land in dispute. No deed covering this tract of land is introduced, no monument or natural object is shown as marking the boundary of this tract, and no occupation or possession of any such tract by Halsey or any of his descendants or grantees is established tending to give it any fixed or definite location.

As said by *Daniel, J.*, in *Mendenhall v. Cassells,* 20 N. C., 51: "In a country recently and of course thinly settled, and where the monuments of boundaries were neither so extensively known nor so permanent in their nature as in the country of our ancestors, we have from necessity departed somewhat from the English rule as to traditionary evidence. We receive it in regard to private boundaries, but we require that it should either have something definite to which it can adhere, or that it should be supported by proof of correspondent enjoyment and acquiescence. A tree, line, or watercourse may be shown to have been pointed out by persons of a bygone generation as the true line or watercourse called for in an old deed or grant. A field, house, meadow or wood may be shown to have been reputed the property of a particular man or family, and to have been claimed, enjoyed and occupied as such. But a mere report, unfortified by evidence of enjoyment or acquiescence, that a man's paper title covers certain territory, is too slight and unsatisfactory to warrant a rational and conscientious person in making it the basis of a decision affecting important rights of his fellow men, and therefore, as far as we are advised, has never been received as competent testimony." And in reference to the time, it has been held in this State that in order to admit evidence of general reputation, unlike hearsay in this particular, it is not necessary to show that such reputation had its origin in the declarations of persons who are dead. *Dobson v. Finley, supra.*

But the decisions are also to the effect that to justify the reception of such evidence, the time at which the common reputation had its origin should be at a remote period. "Comparatively remote," is the term used in *Hemphill's case, supra.* It was so used for the reason that as the principle was established of necessity, when from changing conditions and the absence of permanent monuments, better evidence of boundary could not be procured, so the time may vary to some extent, as the facts and circumstances may show that the neces-

sity does or does not exist. On the admission of such testimony as to the time required, and the test to be applied, it is held in *Neiman v. Ward,* 57 Pa., 67, that "Reputation and hearsay is such evidence as is entitled to respect when the lapse of time is so great as to render it difficult to prove the existence of original landmarks." This alleged general reputation had its origin no further back than 1884, less than 17 years before action brought. It grew out of the survey, the witness said, and on the facts and circumstances of the case, we are of opinion that it is not sufficiently remote to be admitted as evidence.

While we have discussed the question on the idea that a general reputation has been testified to, because it was very earnestly contended that the ruling of the court should be sustained on that principle, as a matter of fact the testimony does not make out a case of general reputation at all, and we could well hold that there was error in not striking out this portion of the evidence in accordance with the defendant's motion. The witness said he knew the line was the Halsey line from "what people said." Again, he said his knowledge grew out of the survey in 1884, and the only person he ever heard say so was Jim Cowan, who was alive, and a witness in the case. This is no testimony of a general reputation, but simply the assertion of a fact by an individual who is still living.

A general reputation must be the common report of the community, and while it may be established by the assertion of individuals, "such assertion must be in effect the statement of the reputation." As stated in the books, "an individual declaration must thus appear to be the result of a received reputation, and the individual declarant is thus merely the mouth-piece of the reputation." 1 Greenleaf Ev., sec. 139; 2 Wigmore Ev., sec. 1584—both authors citing Wood, B., in *Moseley v. Davies,* 11 Price, 180.

There was error in admitting the testimony, and a new trial is awarded.

New Trial.

BULLARD v. HOLLINGSWORTH.

(Filed March 27, 1906).

Boundaries—Evidence—Grants—Title Out of the State—Trespass—Adverse Possession—Presumption—Instructions.

1. Permitting the surveyor, during his examination, to indicate upon the map of the official survey by small red lines the boundaries of certain deeds which defendants had introduced in evidence is a matter within the sound discretion of the trial judge.

2. Evidence of declarations of V. as to the location of an oak, a marked corner, tending to prove that the oak was a corner of the tract called the Jones land claimed by the defendants, was competent, it appearing that V. was dead, disinterested and that the declarations were made *ante litem motam.*

3. To raise a presumption of a grant it is not necessary that the possession adverse to the State should be continuous or unceasing. It is sufficient if it is any possession adverse to the State and shown to exist the length of time prescribed by the statute of limitation.

4. A prayer to instruct the jury that from thirty years' adverse possession against the State all that is necessary to show complete title out of the State is presumed, was correctly modified by adding after the word "possession" the following words: "Such possession having been ascertained and identified under known and visible lines or boundaries." Rev., sec. 380.

5. In an action to recover damages for an alleged trespass, where plaintiff's title was in issue, a request to instruct the jury "That if they find from the evidence that plaintiff has shown title out of the State under either the thirty-year statute or the twenty-one year statute, then the burden is upon the defendants to establish their contentions that they were in continuous, adverse possession by showing that the deeds upon which they rely actually cover the land," was properly refused.

ACTIONS by A. J. Bullard against Jas. Hollingsworth and others, and against Margaret McKenzie and others, consoli-

dated and heard by *Judge Fred Moore* and a jury, at the October Term, 1905, of the Superior Court of CUMBERLAND.

Actions to recover damages for an alleged trespass upon plaintiff's lands and for an injunction restraining the further cutting of timber thereon by the defendants. The two actions were consolidated, and by consent the following issues were submitted to the jury:

1. Is the plaintiff the owner of the land in controversy, or any part thereof, and if of only a part, what part? Answer: No; no part.

2. Did the defendants, James Hollingsworth and wife, unlawfully trespass upon the plaintiff's land, as alleged in the complaint against them? Answer: No.

3. Did the defendants, who claim under Mrs. Margaret A. McKenzie, unlawfully trespass upon the plaintiff's land, as alleged in the complaint against them? Answer: No.

4. What amount of damages, if any, is plaintiff entitled to recover from the defendants, Hollingsworth and wife? Answer: None.

5. What amount of damages, if any, is plaintiff entitled to recover from the defendants, who claim under Mrs. Margaret A. McKenzie? Answer: Nothing.

At the close of the evidence it was agreed that the plaintiffs had failed to produce any evidence tending to show that the heirs of Mrs. Margaret A. McKenzie had committed any trespass upon any of the lands in controversy, and that the issues relative to trespass should be answered in their favor. From the judgment rendered, the plaintiff appealed.

Sinclair & Dye and *H. L. Cook* for the plaintiff.

A. S. Hall for the defendants.

BROWN, J. The plaintiff claimed title to the land in controversy by deed from Gustavus A. Bronson and others, to Margaret E. Heyer, dated July 2, 1875, and by deed, M. E.

Heyer to plaintiff, January 24, 1900. Plaintiff offered evidence for the purpose of locating these deeds; to prove possession on the part of himself and those under whom he claims, and also to establish the alleged trespass.

The defendants offered in evidence a number of deeds as well as a grant, under which they claimed title, and they also offered evidence tending to disprove possession upon the part of the plaintiff, and to prove possession upon their part of the lands in controversy.

There are a large number of exceptions set out in the record, both to the evidence and charge, all of which have received our careful consideration, although we deem it necessary to notice only a few in giving our reasons for affirming the judgment of the Superior Court.

Exceptions 8 to 16 were taken by plaintiff to the ruling of His Honor in permitting the surveyor during his examination to indicate upon the map of the official survey, by small red lines, the boundaries of certain deeds which defendants had introduced in evidence. It seems that during the examination of the surveyor, Averitt, defendants were unable to point out on the plat the beginning point of a certain deed. Thereupon the court asked the witness if he could take the official plat and indicate upon it the contentions of the defendants as to the location of the lines called for in certain deeds introduced by defendants, and he stated that he could. The court directed Averitt, one of the surveyors, to take the plats returned by him and his co-surveyor, made upon a partial actual survey, after notice to the parties as per the order of the court, and to plat out as near as he could defendants' contention from deeds which they had introduced, and mark it off on the plats, to all of which plaintiff objected. Court then took a recess until morning, when the plats were returned into court, and defendants resumed their examination of the witness Averitt, asking him as to the supposed lines in the

deeds which were introduced by them by the small red lines upon the map, to which plaintiff objected.

In actions of ejectment and trespass it is usual, when deemed necessary for the enlightenment of the court and jury, for the court to order a survey. This is done in order that the court and jury may more easily understand the boundaries of the land in controversy, and the bearing which the lines of other tracts have in ascertaining such location. The plats made in obedience to the order of the court are not in any sense evidence *per se*. They are used for the purpose of explaining and elucidating the testimony of the witnesses. In *State v. Whiteacre,* 98 N. C., 753, the court says: "It is a frequent practice, when necessary to explain evidence and enable the jury to comprehend it fully, to illustrate the position of parties, place, etc., by diagram, and no notice is required, in fact they are frequently made by witnesses in the progress of an examination, and often by the direction of the court."

The surveyor stated that he could indicate on the plats the location of defendants' deeds by platting them from the calls of the deeds, and indicating them in small red lines. An examination of the plat shows that he has done so without injury to plaintiff. This did not create any new evidence for the defendants. It only served to illustrate to the jury their contentions. It is a matter within the sound discretion of the trial judge, and in this case it was prejudicial to no one.

The court permitted defendants to introduce the declarations of Samuel Vinson as to the location of an oak, a marked corner, tending to prove that the oak was a corner of the tract called the Jones land, claimed by defendants. The evidence showed clearly that Vinson was dead, disinterested, and that the declarations were made *ante litem motam.* Malone on Real Property Trials, p. 219, and cases cited.

The plaintiff requested the court to instruct the jury: "That to raise the presumption of a grant it is not necessary

that the possession adverse to the State be continuous or unceasing. It is sufficient if it is any possession adverse to the State and shown to be within the time prescribed by the statute of limitation." The court refused to give this instruction as asked, but charged the jury: "That to raise the presumption of a grant it is not necessary that the possession adverse to the State should be continuous or unceasing. It is sufficient, if it is any possession adverse to the State, and shown to exist the length of time prescribed by the statute of limitation."

The instruction asked is erroneous in assuming that any adverse possession *within* the time prescribed by the statute will raise the presumption of a grant. The grant from the State is presumed only after a possession adverse to the State for the full period prescribed by the statute. If there has been adverse possession for any time short of such period, it is not a circumstance to be submitted to the jury as evidence, upon which they may find the fact of a grant. *Reed v. Earnhart,* 32 N. C., 516; *Bullard v. Barksdale,* 33 N. C., 461. We think the instruction given by His Honor is a correct statement of the law.

The plaintiff requested the court to instruct the jury: "That from thirty years' adverse possession against the State, all that is necessary to show complete title out of the State is presumed." The court gave this instruction, adding after the word "possession" the following words: "Such possession having been ascertained and identified under known and visible lines or boundaries." To this modification the plaintiff excepted. The instruction given is in exact accord with the words of the Revisal of 1905, section 380. As the law now stands, such possession must be ascertained under known and visible lines or boundaries. The cases cited by plaintiff are not applicable to the present statute.

The plaintiff further asked the court to instruct the jury: "That if they find from the evidence that the plaintiff has

shown title out of the State under either the thirty year statute or the twenty-one year statute, then the burden is upon the defendants to establish their contentions that they were in continuous, adverse possession by showing that the deeds upon which they rely actually cover the land, and if the jury find from the evidence that the deeds upon which the defendants rely do not cover the land in controversy, then the defendants are not entitled to recover." Merely showing title out of the State will not entitle plaintiff to recover of the defendants for the alleged trespass. In this case, the title is directly put in issue. The burden is, therefore, upon the plaintiff to establish title in himself. He may do this in several different ways, as pointed out in Malone, p. 82, and *Mobley v. Griffin,* 104 N. C., 115. But the plaintiff assumes the burden of proving by a preponderance of the evidence every fact necessary to establish his title to the land, as well as the trespass upon his possession, before he can recover. If the plaintiff recovers at all, he must do so on the strength of his own title, and not the weakness of his adversary's. The burden of proof did not at any stage of the trial shift to the defendants upon either the first issue, as to title, or the second issue, as to trespass. The defendants may offer evidence tending to prove title in themselves or tending to disprove the allegation of trespass, but this is for the purpose of rebutting plaintiff's case and preventing a recovery. It is not because defendants are seeking to *"recover anything,"* as the closing words of plaintiff's prayer would seem to imply.

After a careful review of the entire record, we are unable to find any reversible error.

Affirmed.

MAYERS v. McRIMMON.

(Filed March 27, 1906).

Negotiable Instruments — Endorsements — Holder in Due Course—Evidence.

1. Where the name of the drawee is stamped on the back of a draft with a rubber stamp, by one having authority to do so and with intent to endorse it, it is a valid endorsement, but does not prove itself.

2. Where the plaintiff at the trial presented the draft sued on, with the name of the drawee stamped on the back and testified that the draft had been discounted to him by the drawee before maturity for value and without notice, he is only the equitable owner, in the absence of proof that the instrument had been endorsed, and he holds it subject to any valid defense open to the maker, and it was error to exclude evidence tending to show fraud.

3. To constitute a holder in due course of a negotiable instrument payable to order, it is essential that the same shall be endorsed.

4. In an action on a draft by the plaintiff claiming to be a holder in due course, it was error to exclude evidence of the defendant tending to show that the draft had been seen at a bank unendorsed and after maturity.

ACTION by Albert W. Mayers against N. J. McRimmon and others, heard on appeal from a justice of the peace, by *Judge Fred Moore* and a jury, at the September Term, 1905, of the Superior Court of ROBESON.

The plaintiff declared on two drafts payable to the order of the Continental Jewelry Company, and accepted by the defendants, each in the sum of $16, bearing date April 19, 1904, and payable respectively ten and twelve months after date. The defendants admitting the acceptances, answered and alleged that they were obtained by false and fraudulent representation on the part of the Continental Jewelry Company in the sale of jewelry to the defendants, and also by

means of false and fraudulent warranty inducing the sale, and that the plaintiff took the notes with notice and knowledge of the defenses existing against the notes. On the trial, the plaintiff presented the drafts, and at the time each of these drafts was endorsed with rubber stamp, "Pay to the order of Albert W. Mayers, Continental Jewelry Co., Cleveland, Ohio." The plaintiff also introduced the depositions of the plaintiff and Miles F. Baxter, the general manager of said company, and both testified that the two drafts were discounted to the plaintiff before maturity for value, and without notice of any defense or offset. The defendants, contending that on the facts stated, the plaintiff was only the assignee or equitable holder, offered testimony to show false and fraudulent representation on the part of said company, inducing the purchase, damage, etc., and on objection this evidence was excluded by the court and the defendants excepted. The defendants then offered to prove that one of the defendants saw one of the drafts in the bank at Rowland, before action brought and after maturity, and at that time said draft had no endorsement on it. On objection, this evidence was excluded and the defendants excepted. The court charged the jury that if they believed the evidence, the plaintiff was entitled to recover the amount of the drafts with interest after maturity, and the defendants excepted. Verdict and judgment for the plaintiff and the defendants appealed.

No counsel for plaintiff.

McLean, McLean & McCormick for the defendants.

HOKE, J., after stating the case: In *Tyson v. Joyner,* 139 N. C., 69, it is held "That in an action on a note it is error to hold that the mere introduction of the note, with the name of an endorsee written on the back, is evidence of its endorsement by such endorsee so as to vest the legal title in the plaintiff and cut off any defense against the endorsee, as the signa-

tures of the endorsers, whose endorsement is required to vest the legal title, must be proved." The principle applies in any action on a negotiable instrument where an indorsement is required to vest the legal title so as to constitute the plaintiff a "holder in due course" and the endorsement is denied. In the cases suggested and in the absence of such proof, the plaintiff who presents the note is held to be the equitable owner and the same is subject to defenses or other equities of the maker against prior holders. *Tyson v. Joyner, supra.*

On the trial below the plaintiff presented the drafts, and each appear to have the name of the drawee stamped on the back with a rubber stamp. Where the name required has been so placed by one having authority to do it and with intent to endorse the instrument, the authorities hold that this is a valid endorsement. 4 Am. & Eng. Enc. (2 Ed.), 258; *Horner v. Mo. Pa. R. Co.*, 70 Mo. App., 291. The endorsement, however, does not prove itself, but must be established, as in other cases, by proper testimony.

The depositions of both the plaintiff and the general manager of the Continental Jewelry Co. were received in the court below and they both testified that the notes had been discounted to the plaintiff by the company before maturity for value and without notice, but neither stated that the instruments had been endorsed under any such circumstances. In the absence of such proof the plaintiff then, as stated, is only the equitable owner holding the instruments subject to any valid defense open to the maker, and the evidence offered by the defendants tending to establish such a defense should have been received. There is nothing in our statute on negotiable instruments which contravenes this principle. On the contrary, every part of the statute bearing on the subject declares and sustains it. This statute, enacted in 1899, with a view of introducing some uniformity in this important feature of the law-merchant, is in the main only a compendium of established custom concerning negotiable instruments, as construed and applied in the best considered decisions of the

courts. And both before and since its enactment, it has been held that to constitute a holder in due course of a negotiable instrument payable to order, it is always required that the same should be endorsed. Other requirements may, under given conditions, be dispensed with, but endorsement of such an instrument is essential. Thus, in The Revisal, section 2198, it is provided that "Where the holder of an instrument payable to his order transfers it for value without endorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires in addition the right to have the endorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the endorsement is actually made." And section 2208, relied upon by the plaintiff, is to like effect: "Every holder is deemed *prima facie* a holder in due course," etc. By the very definition established in the act, a "holder" of such an instrument, one payable to order, must be a holder by endorsement. Thus, in section 2340 it is declared "A holder means the payee or endorsee of a bill or note who is in possesion of it, or the bearer thereof." And "bearer" is defined to be "the person in possession of a bill or note which is payable to bearer."

Even if section 2208 had the effect as contended, and it does not, even if the presumption referred to in this section should obtain, there would be error, for the presumption is rebuttable and would yield to facts established by proper testimony. The defendants offered evidence tending to show that one of the drafts had been seen at the bank in Rowland, N. C., unendorsed and after maturity, and this evidence also should have been admitted, for, if this be true, it would in any event destroy the plaintiff's alleged position as holder in due course and subject the note to any legitimate defense available.

There was error in refusing to receive and consider the evidence offered and a new trial is awarded.

New Trial.

BULLARD v. EDWARDS.

(Filed March 27, 1906).

Justice of the Peace—Rehearing—Continuance—Due Diligence—Judgments.

1. Where a judgment has been rendered by a justice of the peace in the absence of either party, in order to give the justice jurisdiction under Revisal, section 1478, to open and rehear the case, the party against whom the judgment was given must make his application by affidavit within ten days after rendition of the judgment.

2. Where a justice of the peace received an affidavit to set aside a judgment rendered against the defendant more than ten days after its rendition and thereupon made an *ex parte* order setting aside the judgment and directing a rehearing, the plaintiff, by procuring a continuance on the date set for the rehearing, did not waive any of his rights.

3. Where a cause was removed at a party's request and he made no inquiry of the justice, to whom it was removed, as to when it would be tried, but relied upon the assurance of the officer of the court for such information, this was not due diligence.

ACTION by D. J. Bullard against Sandy Edwards, heard by *Judge Fred Moore,* at the December Term, 1905, of the Superior Court of ROBESON.

This is a summary proceeding in ejectment instituted in a justice's court. The cause came on for trial before Spurgeon Jones, J. P., on the 7th day of January, 1905, and was removed upon affidavit to Alex McMillan, J. P. Prior to the return day of the summons, the said Spurgeon Jones, J. P., issued a writ removing the defendant from possession of the premises in controversy and placing the plaintiff in possession. The writ was served on January 5, by putting out of possession defendant, Sandy Edwards, and putting into possession the plaintiff, D. J. Bullard.

On the 7th day of January, 1905, in the absence of the defendant, Alex McMillan, J. P., tried the case and rendered judgment that the plaintiff was the owner and entitled to the immediate possession of the premises. Within ten days thereafter, Jas. H. Johnson, Esq., attorney for the defendant Edwards, wrote a letter to the said justice of the peace, stating that the defendant was not notified that the trial would be had on the 7th day of January, and that he and the defendant would have been ready and willing to attend said trial, if they had been notified; that the officer of the court had promised to notify the defendant when the said Alex McMillan would hear the case, and had not done so. Thereupon Alex McMillan notified J. H. Johnson, Esq., attorney for the defendant, that he would open the case for reconsideration, and to send him an affidavit setting forth the facts, in regard to the absence of the defendant and its cause. The affidavit which contained the foregoing statement of facts, was sent to Roderick McMillan, a brother of the justice of the peace, and was received by him on the 17th day of January, and he forwarded it to Alex McMillan, who received the same on the 19th of January. After the affidavit of J. H. Johnson, Esq., was received, the said justice had the parties and witnesses notified to appear before him on the 26th day of January, when the case would be reheard and the same proceedings had as if the case had never been acted on. There is no evidence that any summons, subpœna or other written notice was served upon the parties or the witnesses.

On the 26th day of January, the plaintiff appeared before the justice and filed an affidavit for a continuance until February 2, which was granted. On the second day of February, both plaintiff and defendant were present, and the plaintiff filed with the court what is called a demurrer to the affidavit of J. H. Johnson, Esq. The demurrer, omitting unimportant parts, is as follows: "1. That said affidavit was not filed within ten days from the rendering of the judgment,

said judgment having been rendered on January 7, 1905, and said affidavit was not filed until the 19th day of January, 1905, which was more than ten days thereafter. 2. That said affidavit and prayer was made to Roderick McMillan, and not to this court. 3. That it does not state facts sufficient to warrant the court in reopening the case. 4. That it was the duty of the defendant and not of the court to have notified his counsel, and it was also his duty to have been diligent and to have known where said trial was to be had." The justice overruled the plaintiff's demurrer and ordered that the possession of the property be restored to the defendant. Plaintiff appealed.

At the hearing in the Superior Court the judgment of the justice, rendered on February 2, 1905, was reversed and set aside, and the defendant taxed with the costs. He excepted and appealed.

McIntyre & Lawrence for the plaintiff.
McLean, McLean & McCormick for the defendant.

WALKER, J., after stating the case: The law requires that when a judgment has been rendered by a justice of the peace, in the absence of either party, and the absence was caused by his mistake or excusable neglect, he may, within ten days after the date of the judgment, apply for relief to the justice by affidavit setting forth the facts. If the affidavit, which must be filed with the justice, is deemed by him sufficient, he shall rehear the case and shall cause the parties to be notified of the time and place appointed for the rehearing. Code, sec. 845; Revisal, sec. 1478. It will be seen that, in order to give the justice jurisdiction to open and rehear the case, the party against whom the judgment was given must make his application by affidavit within ten days after rendition of the judgment, which was not done by the defendant in this case. The statute, as we think, can have but one meaning,

namely, that the affidavit, which is the form provided for making the application, must be filed within ten days. The case is governed in this respect by *Navassa Co. v. Bridgers,* 93 N. C., 439. It is there said that after the lapse of ten days the justice has no authority to rehear the case, and as a new trial cannot be had in a justice's court (Revisal, sec. 1489), a dissatisfied party should, after the time has elapsed, either appeal or apply for a *recordari;* if the facts entitle him to either remedy. The defendant's counsel, in his well-considered argument, insisted that the objection made by the plaintiff to the application, upon the ground that it was too late, was not taken in apt time. In the exercise of the power to set aside a judgment, under the statute, it would seem that, as it is a matter of jurisdiction, the justice should proceed strictly according to the provisions of the law *(Navassa Co. v. Bridgers, supra),* and this should appear affirmatively, but even if this is not so, we do not think the objection came too late. The justice, upon receiving the affidavit sent by the defendant's attorney and delivered to him by his brother, set aside the judgment and ordered the case to be reheard. It is true the plaintiff afterwards asked for a continuance to the second day of February, as his counsel could not be present before that time, but at the first opportunity, when all the parties were before the justice and before entering upon the trial of the merits, he "demurred" to the affidavit filed by the defendant for a rehearing of the case, and this in effect called in question the jurisdiction of the court to set aside the judgment and proceed further in the cause. He could not have been heard when the order was made, as it was *ex parte.* We would not give so strained and technical a construction to his application for a continuance, as to exclude therefrom the idea that the plaintiff intended that the whole matter, and not merely the trial upon the merits, should be continued for hearing to a more convenient time, when his counsel could be present to advise and direct him how to proceed in order to

save his rights. We hold that he could do, on the 2nd of February, precisely what he could have done on the 26th of January, and further that he did not intend to waive any of his rights, if the jurisdiction of the justice to proceed as he did can be waived.

The defendant does not appear to have been diligent in taking care of his interests. The cause was removed at his request and he made no inquiry of the justice, who then had acquired jurisdiction in the case by removal, as to when it would be tried, but relied upon the assurance of the officer for such information. The failure of the officer to keep his promise, was defendant's misfortune and not the plaintiff's fault, and he must take the consequences of his misplaced confidence, as we said in *Navassa Co. v. Bridgers,* of similar conduct on the part of the defendant in that case. The judgment was rendered on the 7th of January, the very day the case was removed, and no inquiry was made of the justice, as far as appears, for some days afterwards as to when he would try the case or as to what had been done. This was not due diligence. *McDaniel v. Watkins,* 76 N. C., 399; *Sparrow v. Davidson College,* 77 N. C., 35; *Navassa Co. v. Bridgers, supra.* The cases of *McKee v. Angel,* 90 N. C., 60, and *Whitehurst v. Transportation Co.,* 109 N. C., 344, which were cited by defendant's counsel, are not in point, as there the judgments were rendered without the service of process, and the court merely exercised its general jurisdiction to vacate them. The remedy given by section 1478 of the Revisal is a special one and must be strictly pursued. The affidavit is made the initial step in any application for a rehearing and is indispensable to enable the justice to proceed at all. He must have evidence in some form, or what is equivalent to it, upon which to act. The letter and reason of the law are alike opposed to any other construction.

No Error.

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS FALL TERM, 1905.

CUTRELL v. CUTRELL. From Hyde. *H. S. Ward* for appellee. Dismissed under Rule 17.

PERRY v. GREENWICH INS. CO. From Halifax. *Busbee & Busbee* for petitioner; *Travis, Kitchin & Daniel, contra.* Petition to rehear by plaintiff dismissed.

LASSITER v. SUGG. From Greene. *Lindsay* for appellant; *Galloway* for appellee. Affirmed.

BROCK v. GOLDSBORO LUMBER CO. From Jones. *Moore* and *Guion* for plaintiff (appellant); *A. D. Ward* for defendant. Affirmed.

MCKINNEY v. EDWARDS. From Greene. *Lindsay* for appellee. Dismissed under Rule 17.

COTTEN v. BRADLEY. From Edgecombe. *Fountain* for appellant; *Gilliam* for appellee. Affirmed.

BOURNE v. A. C. L. RAILROAD CO. From Edgecombe. *Bridgers* for petitioner; *Gilliam, contra.* The court being evenly divided (CONNOR, J., not sitting), petition to rehear dismissed.

FARLEY v. FARLEY. From Sampson. *Butler* for plaintiff (appellant); *Grady & Graham* for defendant. Affirmed.

SIKES v. CONSOLIDATED LIGHT AND POWER CO. From New Hanover. *Bryan* for plaintiff (appellant); *Meares* for defendant. Affirmed.

POLLOCK v. DUNN. From Lenoir. *Ormond* for plaintiff

(appellee). Dismissed for want of proper certificate to appeal *in forma pauperis.*

NATIONAL BANK OF GOLDSBORO v. DUNN. From Lenoir. *Isler* for plaintiff (appellee). Dismissed for want of proper certificate to appeal *in forma pauperis.*

STATE v. BLACKLEY. From Wake. *Attorney-General* for State; *Argo & Shaffer* for defendant (appellant). Affirmed.

CABLE CO. v. SMITH. From Harnett. *Stewart & Godwin* for plaintiff; *Clifford* for defendant. Dismissed for failure to print record.

SNIPES v. BELVIN. From Wake. *Douglass & Simms* for plaintiff; *Argo & Shaffer* for defendant (appellant). Affirmed.

DEW v. PIKE. From Brunswick. *Taylor* for plaintiff (appellant); *Bryan* for defendant. Affirmed.

STATE v. HAGINS. From Union. *Attorney-General* for State; *Jerome* for defendant (appellant). Affirmed.

SHANNON v. S. A. L. RAILWAY CO. From Union. *Redwine & Stack* for plaintiff; *Shaw* and *Jerome* for defendant (appellant). Affirmed.

GRAVES v. CAMERON. From Moore. *Adams* for plaintiff (appellee). Dismissed under Rule 17.

STATE v. THOMPSON. From Stanly. *Attorney-General* for State; *R. L. Smith* for defendant (appellant). Affirmed under authority of *In re Gorham,* 129 N. C., 481, and *In re Young,* 137 N. C., 552.

STATE v. MORTON. From Stanly. *Attorney-General* for State; *R. L. Smith* for defendant. Same order as in *State v. Thompson.*

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

MISENHEIMER v. RITCHIE. From Stanly. *Jerome* for plaintiff; *Price* for defendant. Affirmed.

SNOW v. TRANSYLVANIA RAILROAD CO. From Henderson. *Craig* for plaintiff (appellant); *Shuford* and *Shepherd* for defendant. Affirmed.

COBB v. RHEA. From Buncombe. *Barnard* for plaintiff (petitioner); *Shuford, contra.* Petition to rehear dismissed.

GILES v. W. U. TEL. CO. From Buncombe. *Murphy* for plaintiff; *F. H. Busbee* for defendant (appellant). Affirmed.

GREEN v. GREEN. From Jackson. *Moore & Shepherd* for plaintiff; *Horne & Mann* for defendant (appellant). Affirmed.

FRAZIER v. QUEEN. From Swain. *Fry* for plaintiff (appellant); *Bryson & Black* for defendant. Affirmed.

KINSEY v. NOTLA MARBLE CO. From Cherokee. Dismissed under Rule 17.

ROPER v. N. C. MINING CO. From Macon. Dismissed under Rule 17.

STATE v. MILLER. From Union. *Attorney-General* for the State; *Williams & Lemmond* for the defendant (appellant). *Per Curiam*—Upon examination of the record we find no sufficient evidence against the defendant, James Miller, and we therefore award a new trial. New Trial.

RULES OF PRACTICE

IN THE SUPREME COURT

Revised and Adopted 1 June, 1906.

Applicants for License to Practice Law.

1. *When Examined.*

Applicants for license to practice law will be examined on the first Monday in February and the last Monday in August of each year, and at no other time. All examinations will be in writing.

2. *Requirements and Course of Study.*

Each applicant must have attained the age of twenty-one years or will arrive at that age before the time for the next examination, and must have studied:

Ewell's Essentials, 3 volumes.
Clark on Corporations.
Schouler on Executors.
Bispham's Equity.
Clark's Code of Civil Procedure.
Volume 1, Revisal (1905) of North Carolina.
Constitution of North Carolina.
Constitution of the United States.
Creasy's English Constitution.
Sharswood's Legal Ethics.
Sheppard's Constitutional Text Book.
Cooley's Principles of Constitutional Law.
(Or their Equivalents).

Each applicant must have read law for two years at least, and shall file with the clerk a certificate of good moral char-

acter, signed by two members of the bar, who are practicing attorneys of this court and also a certificate of the dean of a law school, or of a member of the bar of this court, that the applicant has read law under his instruction, or to his knowledge or satisfaction, for two years, and upon examination by such instructor has been found competent and proficient in said course. Such certificate, while indispensable, will of course not be conclusive evidence of proficiency. An applicant from another State can file a certificate of good moral character signed by any State officer of the State from which he comes.

If the applicant has obtained license to practice law in another State, in lieu of the certificate of two years reading and proficiency he can file (with leave to withdraw) his law license issued by said State.

3. *Deposit.*

Each applicant shall deposit with the clerk the sum of $23.50 for the license and the clerk's fee before he shall be examined, and if upon examination he shall fail to entitle himself to receive a license, the money (except $1.50 for the clerk) will be returned to him as provided by the statute.

APPEALS—WHEN HEARD.

4. *Docketing.*

Each appeal shall be docketed for the judicial district to which it properly belongs. Appeals in criminal actions shall be placed at the head of the docket of each district. Appeals in both civil and criminal cases shall be docketed, each in its own class, in the order in which they are filed with the clerk.

5. *When Heard.*

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this court

must be docketed at such term seven days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee files a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this court may be filed at such term or at the next succeeding term. If filed seven days before the court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent, it is submitted upon printed argument under Rule 10.

Appeals in criminal actions shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: *Provided, however,* That an appeal in a civil cause from the First, Second and Third Districts, which is tried between 1 January and the first Monday in February, or between 1 August and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

6. *Appeals in Criminal Actions.*

Appeals in criminal cases, docketed seven days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated, shall be called immediately at the close of argument of appeals from the Sixteenth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

7. *Call of Each Judicial District.*

Causes from each of the districts will be called on Tuesday of the week for said district, as follows:

From the 1st District, on Tuesday of the first week.
From the 2d District, on Tuesday of the second week.
From the 3d District, on Tuesday of the third week.
From the 4th District, on Tuesday of the fourth week.
From the 5th District, on Tuesday of the fifth week.
From the 6th District, on Tuesday of the sixth week.
From the 7th District, on Tuesday of the seventh week.
From the 8th District, on Tuesday of the eighth week.
From the 9th District, on Tuesday of the ninth week.
From the 10th District, on Tuesday of the tenth week.
From the 11th District, on Tuesday of the eleventh week.
From the 12th District, on Tuesday of the twelfth week.
From the 13th district, on Tuesday of the thirteenth week.
From the 14th District, on Tuesday of the fourteenth week.
From the 15th District, on Tuesday of the fifteenth week.
From the 16th District, on Tuesday of the sixteenth week.

8. *End of Docket.*

At the Spring Term causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Sixteenth District, and each cause, in its order, tried or continued, subject to Rule 6. At the Fall Term, appeals in criminal actions only will be heard at the end of the docket unless the court, for special reason, shall set a civil appeal to be heard at the end of the docket at that term. At either term the court in its discretion may place cases not reached on the call of a district at the end of some other district.

9. *Call of the Docket.*

Each appeal shall be called in its proper order; if any party shall not be ready, the cause, if a civil action, may be put to

the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise the first call shall be peremptory; or at the first term of the court in the year a cause may, by consent of the court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. *Submission on Printed Argument.*

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on docket, or date of docketing appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket, but the court, notwithstanding, can direct an oral argument to be made, if it shall deem best.

11. *If Orally Argued.*

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. *If Brief Filed by Either Party.*

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

13. *Cases Heard Out of Their Order.*

In cases where the State is concerned, involving or affecting some matter of general public interest, the court may, upon motion of the Attorney-General, assign an earlier place in the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the court, at the instance of the party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance in its judgment, may make the like assignment in respect to it.

14. *Cases Heard Together.*

Two or more cases involving the same question may, by order of the court, be heard together, but they must be argued as one case, the court directing, when the counsel disagree, the course of argument.

When Dismissed.

15. *If Appeal Not Prosecuted.*

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

16. *Motion to Dismiss.*

A motion to dismiss an appeal for non-compliance with the requirements of the statute in perfecting an appeal, must

be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless the court shall allow appropriate amendments.

17. *Dismissed by Appellee.*

If the appellant in a civil action shall fail to bring up and file a transcript of the record seven days before the court begins the call of causes from the district from which it comes at the term of this court at which such transcript is required to be filed, the appellee may file with the clerk of this court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal which motion shall be allowed at the first session of the court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause.

18. *When Appeal Dismissed.*

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid, or offered to pay, the costs of the appellee in procuring the certificate, and in causing the same to be docketed.

TRANSCRIPTS.

19. *Transcript of Record.*

(1) THE RECORD.—In every record of an action brought to this court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, etc., shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered.

(2) EXCEPTIONS GROUPED.—All the exceptions relied on, grouped, and numbered, shall be set out immediately after statement of case on appeal.

(3) INDEX.—On the front page of the record there shall be an index in the following or some equivalent form:

Summons—date.....page 1
Complaint—First cause of action.....page 2
Complaint—Second cause of action.....page 3
Affidavit for Attachment, etc.....page 4

20. *Insufficient Transcript.*

If any cause shall be brought on for argument, and the above regulations shall not have been complied with, the case shall be dismissed or put to the end of the district, or the end of the docket, or continued, as may be proper. If not dismissed, it shall be referred to the clerk, or some other person, to put the record in the prescribed shape, for which an allowance of five dollars will be made to him, to be paid in advance in each case by the appellant, or the appeal will be dismissed.

21. *Summary of Exceptions.*

A case will not be heard until there shall be put in the record, as required in Rule 19 (2), the summary of excep-

tions, taken on the trial, and those taken in ten days thereafter, to the charge. Those not thus set out will be deemed to be abandoned.

22. *Unnecessary Records.*

The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall, in all cases, be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

PLEADINGS.

23. *Memoranda Of.*

Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

24. *Assigning Two or More Causes of Action.*

Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

25. *When Scandalous.*

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the court to be stricken from the record, or reformed, and for this purpose the court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

26. *Amendments.*

The court may "amend any process, pleading or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the court may deem it necessary and proper for the purpose of justice, and on such terms as the court may prescribe." Revisal (1905), sec. 1545.

EXCEPTIONS.

27. *How Assigned.*

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the court at chambers and not in term time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exception not thus set out, or filed and made a part of the case or record, shall be considered by this court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

PRINTING RECORDS.

28. *What to Be Printed.*

Fifteen copies of the entire transcript sent up in each action shall be printed, except in pauper appeals. In these latter, the counsel for the appellant shall furnish a sufficient number of printed or typewritten briefs for the use of the court, giving a succinct statement of the facts applicable to the exceptions, and the authorities relied on. Should the appellant gain the appeal, the cost of the same shall be taxed against the appellee.

The printed transcript shall be in the order required by Rule 19 (1), and shall contain the grouped and numbered and index required by Rule 19 (2) and (3), though for economy the marginal references in the manuscript, required by Rule 11 of the Superior Court, may be printed as sub-heads in the body of the record, and not on the margin. The transcript shall be printed immediately after docketing the same, unless it is sent up printed.

29. *How Printed.*

The transcript on appeal shall be printed under the direction of the clerk of this court, and in the same type and style, and pages of same size, as the reports of this court, unless it is printed below in the required style and manner. If it is to be printed here, the party sending up an appeal shall send therewith a deposit in cash, for that purpose, to the clerk of this court, of sixty cents (which includes ten cents for the clerk) for each printed page—said cash deposits to be estimated at 50 cents for each page of the transcript of the record.

30. *If Not Printed.*

If the transcript on appeal (except in pauper appeals) shall not be printed as required by the rules, by reason of the

failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dimissed; but the court may, on motion of appellant, after five days' notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The court will hear no cause in which the rule as to printing is not complied with, other than pauper appeals.

31. *Costs of Printing.*

The actual cost of printing the transcript on appeal shall be allowed to the successful party, not to exceed, however, fifty cents per page of one copy of the printed transcript, and not exceeding sixty pages of the above specified size and type, unless otherwise specially ordered by the court; and he shall be allowed ten cents additional for each such page paid to clerk of this court for making copy for the printer, unless the appellant shall send up a duplicate manuscript or type-written copy for that purpose, or shall have the copies printed below.

Judges and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in

that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

32. *Printed Briefs.*

Printed briefs of both parties shall be filed in all cases (except in pauper appeals as provided in Rule 28). Such briefs may be sent up by counsel ready printed, or they may be printed under the supervision of the clerk of this court if a proper deposit for cost of printing is made, as specified in Rule 29. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited if discovered after brief filed.

ARGUMENT.

33. *Oral Arguments.*

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) The counsel for the appellant may be heard for one hour, including the opening argument and reply.

(3) The counsel for the appellee may be heard for one hour.

(4) The time occupied in stating the facts, or in reading the record before the argument begins, shall not be counted as part of the time allowed for the argument; but this shall not embrace such parts of the record as may be read pending the argument.

(5) The time for argument may be extended by the court in a case requiring such extension, but application for extension must be made before the argument begins. The court, however, may direct the argument of such points as it may see fit outside of the time limited.

(6) Any number of counsel may be heard on either side within the limit of the time above specified; but, if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the court, so as to avoid tedious and useless repetition.

34. *Appellant's Brief.*

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except that as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exceptions and assignments of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment, and, if statutes are material, the same shall be cited by the book, chapter and section. Exceptions in the record not set out in appellant's brief will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application. If not filed by 12 o'clock noon on Saturday of the week preceding the call of the district to which the cause belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless, for good cause shown, the court shall give further time to print brief.

35. *Copies of Brief to Be Furnished.*

Fifteen copies shall be delivered to the clerk of the court, one of which shall be filed with the transcript of the record, one handed to each of the justices at the time the argument shall begin, one to the reporter, and one to the opposing counsel.

36. *Brief of Appellee.*

The appellee shall file the same number of like briefs, except that he may omit the statement of the case, and it shall be distributed in like manner. Said briefs shall be filed before 10 a. m. on Tuesday of the week of the call of the district to which the cause belongs, shall be noted by the clerk on his docket, and a copy furnished by him to opposite counsel on application. On failure to file said brief by that time, the cause will be heard and disposed of without argument from appellee, unless, for good cause shown, the court shall give further time to present brief.

37. *Cost of Briefs.*

The actual cost of printing his brief not exceeding fifty cents per page of the size of the pages in the North Carolina Reports, and not exceeding twenty pages, shall be allowed to the successful party, to be taxed in the bill of costs.

38. *Re-argument.*

The court will, of its own motion, direct a re-argument before deciding any case, if, in its judgment, it is desirable.

39. *Agreement of Counsel.*

The court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this court.

40. *Entry of Appearance.*

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in

the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the court.

Certiorari and Supersedeas.

41. *When Applied For.*

Generally the writ of *certiorari,* as a substitute for an appeal, must be applied for at the term of this court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

42. *How Applied For.*

The writs of *certiorari* and *supersedeas* shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested, and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases, the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit and such other evidence as may be pertinent.

43. *Notice Of.*

No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days' notice, in writing, of the same; but the court may, for just cause shown, shorten the time for such notice.

Additional Issues.

44. *If Other Issues Necessary.*

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the court, and certified to the Superior Court for trial, and the case will be retained for that purpose.

Motions.

45. *In Writing.*

All motions made to the court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motion, not leading to debate, nor followed by voluminous evidence, may be made at the opening of the session of the court.

Abatement and Revivor.

46. *Death of Party.*

Whenever, pending an appeal to this court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes, and, if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal

heard and determined according to the course of the court: *Provided,* Such order shall be served upon the opposing party.

47. *When Appeal Abates.*

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

OPINIONS.

48. *When Certified Down.*

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court, which shall have been on file ten days, in cases sent from said court. Revisal 1905, sec. 1549. But the court in its discretion may order an opinion certified down at an earlier day.

THE JUDGMENT DOCKET.

49. *How Kept.*

The judgment docket of this court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs, or interlocutory or upon the merits is entered. On this docket the clerk of the court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money—stating the names of the parties, the term at which such judgment was entered, its number on the docket of the court; and when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this

court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

Execution.

50. *Teste of Executions.*

When an appeal shall be taken after the commencement of a term of this court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

51. *Issuing and Return of.*

Executions issuing from this court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and, when satisfied, the fact shall be certified to this court, to the end that an entry to this effect be made here.

Executions for the costs of this court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of term, returnable, on a day named, at the next succeeding term of this court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

Petition to Rehear.

52. *When Filed.*

A petition to rehear may be filed in the clerk's office at the same term, or during the vacation succeeding the term of the court at which the judgment was rendered, or not later than the third Monday of the succeeding term.

53. *What to Contain.*

The petition must assign the alleged error of law complained of; or the matter overlooked; or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this court, who have no interest in the subject-matter, and have never been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this court; that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion; and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

The petitioner shall endorse upon the petition, of which he shall file two copies, the names of the two justices, neither of whom dissented from the opinion, to whom the petition shall be sent by the clerk, and it shall not be docketed for rehearing unless both of said justices endorse thereon that it is a proper case to be reheard: *Provided, however,* That when there have been two dissenting justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall endorse on the petition the date on which it was received, and it shall be delivered by him to the justice or justices designated by the petitioner.

There shall be no oral argument before the justices or justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the court (unless the court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing, the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

54. *Stay of Execution.*

When a petition to rehear is filed with the clerk of this court, the justice or justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the court below, when the appeal was taken, by giving the required security, he shall at the time

of applying to the justice or justices for a stay tender sufficient security for that purpose, which shall be approved by the justice or justices. Notice of the application for a stay must be given to the other party, if deemed proper by the justice or justices, for such time before the hearing of the application and in such manner as may be ordered. If a certificate for a rehearing is denied, or if granted and the petition is afterwards dismissed, the stay shall no longer continue in force and execution may issue at once or the judgment or order be otherwise enforced unless, in case the petition is dismissed, the court shall otherwise direct. When a stay is granted the order shall run in the name of this court and be signed and issued by the clerk under its seal, with proper recitals to show the authority under which it was issued.

Clerk and Commissioners.

55. *Report of Funds in Hands Of.*

The clerk and every commissioner of this court who, by virtue or under color of any order, judgment or decree of the Supreme Court, in any action or matter pending therein, has received, or shall receive, any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said court held next after the first day of January in each year, report to the court a statement of said fund, setting forth the title and number of the action or matter, the term of the court at which the order or orders under which the clerk or such commissioner professes to act was made; the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund, and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

56. *Report Recorded.*

The reports required by the preceding paragraph shall be examined by the court, or some member thereof, and their or his approval endorsed shall be recorded in a well-bound book, kept for the purpose, in the office of the clerk of the Supreme Court, entitled *Record of Funds,* and the cost of recording the same shall be allowed by the court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

Books.

57. *Books Taken Out.*

No book belonging to the Supreme Court Library shall be taken therefrom except into the Supreme Court chamber, unless by the justices of the court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the marshal of the court, and then only upon the application in writing of a judge of a Superior Court, holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

Clerk.

58. *Minute Book.*

The clerk shall keep a *Permanent Minute Book,* containing a brief summary of the proceedings of this court in each appeal disposed of.

59. *Clerk to Have Opinions Typewritten and Sent to Judges.*

After the court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause five typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the court, to the end that the same may be carefully examined, and the bearing of the authorities cited may be considered prior to the day when the opinion shall be finally offered for adoption by the court and ordered to be filed.

LIBRARIAN.

60. *Reports by Him.*

The Librarian shall keep a correct *Catalog* of all books, periodicals and pamphlets in the library of the Supreme Court, and report to the court on the first day of the Spring Term of each year, what books have been added to the Library during the year next preceding his report by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

61. *Sittings of the Court.*

The court will sit daily, during the term, Sundays and Mondays excepted, from 10 a. m. to 2 p. m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law.

62. *Citation of Reports.*

Inasmuch as all the reports prior to the 63d have been reprinted by the State, with the number of the volumes

instead of the name of the Reporter, counsel will cite the volumes prior to the 63 N. C. as follows:

1 and 2 Martin Taylor & Conf.	as	1	N. C.	9 Iredell Law	as	31	N. C
1 Haywood	"	2	"	10 " "	"	32	"
2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"	12 " "	"	34	"
1 Murphey	"	5	"	13 " "	"	35	"
2 "	"	6	"	1 " Eq.	"	36	"
3 "	"	7	"	2 " "	"	37	"
1 Hawks	"	8	"	3 " "	"	38	"
2 "	"	9	"	4 " "	"	39	"
3 "	"	10	"	5 " "	"	40	"
4 "	"	11	"	6 " "	"	41	"
1 Devereux Law	"	12	"	7 " "	"	42	"
2 " "	"	13	"	8 " "	"	43	"
3 " "	"	14	"	Busbee Law	"	44	"
4 " "	"	15	"	" Eq.	"	45	"
1 " Eq.	"	16	"	1 Jones Law	"	46	"
2 " "	"	17	"	2 " "	"	47	"
1 Dev. & Bat. Law	"	18	"	3 " "	"	48	"
2 " "	"	19	"	4 " "	"	49	"
3 & 4 " "	"	20	"	5 " "	"	50	"
1 Dev. & Bat. Eq.	"	21	"	6 " "	"	51	"
2 " "	"	22	"	7 " "	"	52	"
1 Iredell Law	"	23	"	8 " "	"	53	"
2 " "	"	24	"	1 " Eq.	"	54	"
3 " "	"	25	"	2 " "	"	55	"
4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
8 " "	"	30	"	1 and 2 Winston	"	60	"
				Phillips Law	"	61	"
				" Eq.	"	62	"

☞In quoting from the **reprinted** Reports counsel will cite always the marginal (*i. e.*, the original) paging, except 1 N. C. and 20 N. C., which have been re-paged throughout, without marginal paging.

RULES OF PRACTICE

IN THE SUPERIOR COURTS

REVISED AND ADOPTED BY

THE JUSTICES OF THE SUPREME COURT,

1 JUNE, 1906,

By Virtue of Revisal (1905), Section 1541.

RULES.

1. *Entries on Records.*

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. *Surety on Prosecution Bond and Bail.*

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace.

3. *Opening and Conclusion.*

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. *Examination of Witnesses.*

When several are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel; but the counsel may change with each successive witness, or with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. *Motion for Continuance.*

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

(The above rules substantially prescribed by the Supreme Court at January Term, 1815.)

6. *Decision of Right to Conclude not Appealable.*

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument, the court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

7. *Issues.*

Issues shall be made up as provided and directed in The Revisal, secs. 548 and 549.

8. *Judgments.*

Judgments shall be docketed as provided and directed in The Revisal, secs. 573 and 574.

9. *Transcript of Judgment.*

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket, to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. *Docketing Magistrates' Judgments.*

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and, if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. *Transcript to Supreme Court.*

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same.

On the first page of the transcript of the record, there shall be an index in the following or some equivalent form:

Summons—date.....page 1
Complaint—First cause of action.....page 2
Complaint—Second cause of action.....page 3
Affidavit of Attachment.....page 4
and so on to the end.

12. *Transcript on Appeal—When Sent Up.*

Transcripts on appeal to the Supreme Court shall be forwarded to that court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court. Revisal, sec. 592.

13. *Reports of Clerks and Commissioners.*

Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment or decree of the court in any action or proceedings pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act, were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The report required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first

term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. *Recordari.*

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas,* if prayed for as required by The Revisal, sec. 584. In such case, the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days' notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof—unless for good cause shown the hearing shall be continued—upon the petition, answer, affidavits and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. *Judgment—When to Require Bonds to Be Filed.*

In no case shall the court make or sign any order, decree or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. *Next Friend—How Appointed.*

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen, and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. *Guardian Ad Litem—How Appointed.*

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. *Cases Put at Foot of Docket.*

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. *When Opinion is Certified.*

When the opinion of the Supreme Court in any cause which has been appealed to that court has been certified to the Superior Court, such cause shall stand on the docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Revisal, sec. 3283.

20. *Calendar.*

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. *Cases Set for a Day Certain.*

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. *Calendar Under Control of Court.*

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. *Non-Jury Cases.*

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. *Appeals from Justices of the Peace.*

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. *On Consent Continuance—Judgment for Costs.*

When civil actions shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. *Time to File Pleadings—How Computed.*

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. *Counsel Not Sent For.*

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. *Criminal Dockets.*

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and num-

ber the criminal business of the court in the following order:

First—All criminal causes at issue. Second—All warrants upon which parties have been held to answer at that term. Third—All presentments made at preceding terms, undisposed of. Fourth—All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. *Civil and Criminal Dockets——What to Contain.*

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First—The names of the parties. Second—The nature of the action. Third—A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein. Fourth—A blank space for the entries of the term.

30. *Books.*

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of the reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

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ACCIDENT INSURANCE. See "Insurance."

ACCOUNTING.

In an action for an accounting where it is alleged that a certain item of costs in another action was a proper charge against the defendant, and was first allowed by the referee and afterwards omitted from his account reported in obedience to an order requiring a new account to be taken and stated, to which omission plaintiff excepted and thereafter a final judgment was rendered which did not in terms include this allowance, but provided on the contrary that plaintiff should recover a certain sum and the costs of action, which necessarily excluded from the judgment the recovery of said certain item of costs, *held*, that the court erred at a subsequent term in ordering the case reinstated on the docket for further proceedings where there was no exception to the judgment and no appeal taken therefrom. *Bunker v. Bunker*, 18.

Where in an action for an accounting by the terms of the judgment (which was final and to which there was no exception) the account was closed to the day of its rendition, no other or further accounting could be ordered in respect to matters not included in that suit, but such relief must be sought in a new and independent action. *Bunker v. Bunker*, 18.

Where the plaintiff asked for an accounting, averring that the defendant was indebted to him and the defendant submitted to an account, averring that the plaintiff owed him a balance, and an account was taken and report made and exceptions filed by plaintiff, the court committed no error in denying a motion for nonsuit. *Boyle v. Stallings*, 524.

In cases purely equitable in their nature, if an account has been taken and report made, the plaintiff will not be allowed to suffer judgment of nonsuit. *Boyle v. Stallings*, 524.

ACCRUAL OF CAUSE OF ACTION.

Where a cause of action for damages to land accrued in the lifetime of the testator or intestate, or in other words, the injury was committed during that time, it survives to his executor or administrator; if it was committed after his death, the right of action would belong to the heir or devisee. *Mast v. Sapp*, 533.

Where the wall of a city reservoir was undermined and fell, by reason of its faulty construction, on the lot of defendant's

ACCRUAL OF CAUSE OF ACTION—*Continued.*

intestate and struck her house, the first injury was sustained and the wrong was complete just as soon as the wall fell and struck her house, and her cause of action immediately arose for all ensuing damage of which the injurious act was the efficient cause. *Mast v. Sapp*, 533.

If the injury developed in the lifetime of defendant's intestate, who was killed in the house and the damage followed in an unbroken sequence as the direct and proximate result of it, the defendant administrator is entitled to recover the fund paid by the city for the property destroyed belonging to his intestate. *Mast v. Sapp*, 533.

In a contest between the heir and the personal representative to determine the rightful claimant to a fund paid by the city for destroying the intestate's house by its reservoir falling and crushing it, the question is not whether the intestate survived the destruction of her property, but whether the injury was committed before or after her death. *Mast v. Sapp*, 533.

If the destruction of the house and the death of the intestate occurred at one and the same instant of time, the heir would not be entitled to the fund in dispute. *Mast v. Sapp*, 533.

ACTS. See "Code, The;" "Revisal;" "Legislature."

1866, ch. 40. Marriage of Slaves. *Bettis v. Avery*, 186.
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1893, ch. 22. Processioning. *Stanaland v. Rabon*, 202.
1895, ch. 244. Permanent Damages. *Cherry v. Canal Co*, 426.
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ADMINISTRATION. See "Executors and Administrators."

ADVERSE POSSESSION. See "Possession;" "Deeds;" "Ejectment."

The repeal of the disability of coverture by the Act of 1899 (Rev., sec. 363,) was not retroactive—no adverse possession, prior to February 13, 1899, being counted against a married woman. *Norcum v. Savage,* 472.

Where there was execution against a life tenant in 1869 and sale thereunder and a subsequent conveyance back by the purchaser to him, the seven years' statute of adverse possession would not begin to run against the remaindermen, till his death. *Norcum v. Savage,* 472.

To raise a presumption of a grant it is not necessary that the possession adverse to the State should be continuous or unceasing. It is sufficient if it is any possession adverse to the State and shown to exist the length of time prescribed by the statute of limitation. *Bullard v. Hollingsworth,* 634.

A prayer to instruct the jury that from thirty years' adverse possession against the State all that is necessary to show complete title out of the State is presumed, was correctly modified by adding after the word "possession" the following words: "Such possession having been ascertained and identified under known and visible lines or boundaries." Rev., sec. 380. *Bullard v. Hollingsworth,* 634.

In an action to recover damages for an alleged trespass, where plaintiff's title was in issue, a request to instruct the jury "that if they find from the evidence that plaintiff has shown title out of the State under either the thirty-year statute or the twenty-one year statute, then the burden is upon the defendants to establish their contentions that they were in continuous, adverse possession by showing that the deeds upon which they rely actually cover the land," was properly refused. *Bullard v. Hollingsworth,* 634.

AGENCY. See "Principal and Agent."

AMENDMENTS. See "Pleadings."

Where an objection for defect of parties was made below and overruled, this court will not exercise its discretionary power of amendment to destroy an exception duly taken below. *West v. Railroad*, 620.

ANNUAL ACCOUNT. See "Evidence."

ANSWER. See "Pleadings."

APPEAL AND ERROR.

An appeal from an order of re-reference of a case to the referee to find a fact which the court deemed material, is premature and will be dismissed. *Chemical Co. v. Lackey*, 32.

Plaintiff may submit to an involuntary nonsuit, which he is driven or compelled to take, reserving leave to move afterwards to set the same aside, with a view not to abandon the prosecution of the suit, but to further prosecute it by appeal, in order to test the correctness of a ruling of the court which may otherwise be fatal to his case. *Hayes v. Railroad*, 131.

While in injunction cases, the findings of fact by the judge below are not conclusive on appeal, still there is a presumption that the judgment and proceedings below are correct and the burden is upon the appellant to assign and show error. *Hyatt v. DeHart*, 270.

Where there was evidence to sustain the findings of facts as to the rescission and abandonment of a contract, the findings will not be reviewed by this court. *May v. Getty*, 310.

An intimation of an opinion by the judge adverse to the plaintiff upon some proposition of law, which does not "take the case from the jury," and which leaves open essential matters of fact still to be determined by them, will not justify the plaintiff in suffering a nonsuit and appealing. Such nonsuits are premature and the appeals will be dismissed. *Midgett v. Manufacturing Co.*, 361.

Where a case was tried below in the fall and docketed in this court three days before the district was called at the opening of the spring term, a motion on the first day of the spring term to dismiss the appeal because not docketed seven days before the call of the district as required by rule 5, will be denied. *Craddock v. Barnes*, 427.

The ruling, that though an appeal is not docketed seven days before the call of the district to which it belongs, as required by rule 5, it will not be dismissed (when docketed at the next term here after the trial below) if it is docketed before the motion is

APPEAL AND ERROR—*Continued.*

made to dismiss, applies to the first as well as the other districts, as the appellee can file his motion to dismiss with the clerk whether the court is in session or not. *Craddock v. Barnes*, 427.

In order to constitute reversible error, it must appear that the appellant's rights have in some way been prejudiced by the action of the court below. *Hosiery Co. v. Cotton Mills*, 452.

Where the evidence, admitted over appellant's objection and afterwards withdrawn from the jury, was so compact and brief and the language of the judge so clear in withdrawing it, that this court is satisfied the jury could not have been misled or unduly influenced against appellant by it, a new trial will not be ordered. *Parrott v. Railroad*, 546.

ARGUMENT OF COUNSEL.

The tendering of witnesses by the defendant for the purpose of having their fees taxed as costs does not amount to the introduction of evidence within the meaning of the Superior Court, rule 3, and does not take from the defendant the right to open and conclude the argument. *Brown v. Railroad*, 154.

Where evidence was introduced for the consideration of the court alone and this was fully explained to the jury, the fact that counsel commented upon it, cannot be made the ground for exception now, where no objection was made at the time. *Sprinkle v. Wellborn*, 163.

ARREST AND BAIL.

Where an action at law will lie by one partner against another, if the facts bring the claim within the provisions of our statutes on arrest and bail, the plaintiff is entitled to this ancillary remedy. *Ledford v. Emerson*, 288.

When the plaintiff sues to recover his share arising from a sale of certain options on land, which the plaintiff took in the name of the defendant under an agreement that the defendant was to advance the incidental expenses, sell the options and divide the profits equally, it was error to discharge an order of arrest of the defendant allowed upon proof of fraud on his part in connection with the sale of the options. *Ledford v. Emerson*, 288.

ASSUMPTION OF RISK. See "Negligence;" "Contributory Negligence."

Where there was evidence tending to prove that one of the standards used to hold the logs in place was gone, an instruction that "when the plaintiff went on the log car for the purpose of rid-

ASSUMPTION OF RISK—*Continued.*

ing, he assumed the risk of all the dangers incident to riding on a log train," was erroneous in that the court should have further stated that the plaintiff assumed no risk resulting from a defective car. *Tanner v. Lumber Co.*, 475.

If the plaintiff knew that the standard was gone when he mounted the loaded car, and if in consequence thereof the danger to himself was so obvious that no man of ordinary prudence would have ridden on it, then the plaintiff did assume the risk and would be guilty of such contributory negligence as would bar a recovery. *Tanner v. Lumber Co.*, 475.

ATTACHMENT. See "Malicious Prosecutions;" "Executions;" "Judgments;" "Judicial Sales."

ATTORNEY AND CLIENT. See "Argument of Counsel."

Where the jury found that the plaintiffs were employed by the defendant as attorneys to represent him and take care of his interest, and that they rendered services to him under the contract, they were entitled to recover what their services were reasonably worth, there being no stipulation as to the amount the plaintiffs were to receive; and it makes no difference whether the issue "Did defendant knowingly accept the benefit of such services?" was answered or not. *Simmons v. Davenport*, 407.

AUDITOR OF BUNCOMBE COUNTY.

Chapter 703, Laws 1905, which created the office of Auditor of Buncombe County and prescribed as one of his duties that of making out the tax lists and further required him to perform "all the duties required by section 74 of the Public Laws of 1905 to be performed by the register of deeds," etc., will be construed to refer to section 74 of the Machinery Act, which prescribes the duties of the register of deeds with reference to making out tax lists, this being the only chapter of the Laws of 1905 that contains as many as 74 sections and the only one referring to such duties. *Fortune v. Commissioners*, 322.

The fact that the Machinery Act (chap. 590) was ratified two days later than chapter 703 should not have the effect of defeating the will of the Legislature otherwise sufficiently declared, judicial notice being taken of the requirements of the Constitution, Article II, section 14, that a law imposing taxes cannot pass unless the bill has been read on three several days. *Fortune v. Commissioners*, 322.

The auditor's duty prescribed by section 12 of chapter 703, Laws 1905, of examining all books and papers of the county officials, for the purpose of keeping a record of fees and commissions

AUDITOR OF BUNCOMBE COUNTY—*Continued.*

received by them cannot be performed under the terms of the act until after the next election, it being manifest that the change from the fee to the salary system was not to take effect until after the present terms expire. *Fortune v. Commissioners*, 322.

The provision of section 12 of chapter 703, Laws 1905, that the auditor shall prepare the tax lists and perform all other duties prescribed by section 74 of the Machinery Act, is effective from July 1, 1905, when the auditor's term of office commenced. *Fortune v. Commissioners*, 322.

The expression used in section 22, namely: "This act shall be in full force and effect," must have been intended, by implication, to give the act immediate operation as to those matters which pertained to the office of auditor, created by it, for the regulation of which there seemed to be urgent need. *Fortune v. Commissioners*, 322.

BANKRUPTCY.

A payment of money is a transfer of property under the definition of the word "transfer" as used in the bankrupt act. *Wright v. Cotten*, 1.

To make a transfer voidable within the provisions of the bankrupt act, it is necessary to establish: (1) The insolvency of the transferrer. (2) The obtaining by the creditor of a larger percentage of his debt than any other creditor of the same class. (3) The giving of a preference within four months before the filing of a petition in bankruptcy. (4) Reasonable cause upon the part of the creditor to believe that a preference was intended. *Wright v. Cotten*, 1.

The creditor must have reasonable cause to believe the debtor insolvent in fact, as a foundation for reasonable cause to believe that an unlawful preference was intended. *Wright v. Cotten*, 1.

Where it is established that debtor at the time of the alleged preferential payment to his father, was the latter's general financial agent, and that he practically paid himself for his father, it follows that his personal knowledge of his own utter insolvency is imputable to his principal and that the father is affected by all knowledge possessed by his son, his agent. *Wright v. Cotten*, 1.

In an action by a trustee in bankruptcy to recover an unlawful preference, it is not necessary for a plaintiff to show a fraudulent intent upon the part of the creditor, or that the latter did not give a present fair consideration for the transfer. *Wright v. Cotten*, 1.

BANKRUPTCY—*Continued.*

Where the agent of the creditor had reasonable cause at the time to believe the debtor insolvent, and knew that the transaction was in fraud of the bankruptcy law, it is the same as if the creditor himself had taken part therein, with the same cause to believe and the same knowledge. *Wright v. Cotten*, 1.

BILATERAL CONTRACTS. See "Contracts."

BERTHS, FAILURE TO SUPPLY. See "Steamship Companies;" "Carriers."

BLOOD POISONING.

Where in the main body of an insurance policy there is a definite stipulation of indemnity in case of disability arising from certain specified diseases, blood poisoning being one expressly named, various provisos entirely withdrawing blood poisoning from the operations of the policy cannot avail to defeat the plaintiff's recovery for the indemnity for disability arising from said disease. *Jones v. Casualty Co.*, 262.

BONDS. See "Executor and Administrator."

BOUNDARIES. See "Deeds."

Whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance specified. *Hill v. Dalton*, 9.

Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land. *Hill v. Dalton*, 9.

The declaration of a person deceased, at the time of the trial, in regard to a corner or line in controversy, is competent, provided the declarant had opportunity of knowing, had no interest in making the declaration at the time and that it was *ante litem motam*. *Hill v. Dalton*, 9.

To justify the admission of evidence of common reputation on questions of private boundary, the time at which this reputation had its origin should be a comparatively remote period and always *ante litem motam* and should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location. *Bland v. Beasley*, 628.

Evidence of declarations of V. as to the location of an oak, a marked corner, tending to prove that the oak was a corner of

BOUNDARIES—*Continued.*

the tract called the Jones land claimed by the defendants, was competent, it appearing that V. was dead, disinterested and that the declarations were made *ante litem motam. Bullard v. Hollingsworth,* 634.

Permitting the surveyor, during his examination, to indicate upon the map of the official survey by small red lines the boundaries of certain deeds which defendants had introduced in evidence is a matter within the sound discretion of the trial judge. *Bullard v. Hollingsworth,* 634.

BREACH OF WARRANTY. See "Warranty."

BUNCOMBE COUNTY, AUDITOR OF. See "Auditor of Buncombe County."

BURDEN OF PROOF.

In a proceeding under the "Processioning Act," chapter 22, Laws 1893, to establish a disputed line, the burden of proof is upon the plaintiff. *Hill v. Dalton,* 9.

The effect of the privilege is to cast upon the plaintiff the burden of showing malice on the defendant's part in uttering or publishing the alleged slanderous words. *Gattis v. Kilgo,* 106.

In an action against a register of deeds to recover the penalty under section 1814 of The Code, 2088-90 of the Revisal, the burden of proof is upon the plaintiff to show that the defendant knowingly or without reasonable inquiry, issued the license contrary to law. *Furr v. Johnson,* 157.

In an action to recover the penalties provided in section 2319 of The Code for illegally ranging cattle and sheep in Swain County, in order to justify the defendants in ranging their cattle and sheep the burden is upon them to show that they own an estate in land in said county for one year or other higher estate and the question of the defendants' good faith and *bona fide* claim of title to land does not enter into the case. *Rose v. Davis,* 266.

The burden is upon the plaintiff to show that a prior entry was invalid for indefiniteness, for in the absence of any proof to the contrary, the court must assume that the entry and survey conformed to the statute. *Frasier v. Gibson,* 272.

One who chooses to make positive assertions without warrant, shall not excuse himself by saying that the other party need not have relied upon him. He must show that his representation was not in fact relied upon. *Griffin v. Lumber Co.,* 514.

BURDEN OF PROOF—*Continued.*

In an action to recover damages for an alleged trespass, where plaintiff's title was in issue, a request to instruct the jury "that if they find from the evidence that plaintiff has shown title out of the State under either the thirty-year statute or the tweny-one year statute, then the burden is upon the defendants to establish their contentions that they were in continuous, adverse possession by showing that the deeds upon which they rely actually cover the land," was properly refused. *Bullard v. Hollingsworth,* 634.

CANCELLATION. See "Rescission."

CAPITATION TAX. See "Taxation."

CARRIERS. See "Railroads;" "Steamship Companies."

A common carrier must serve the public without discrimination and sell its tickets and accommodations in the order of application, and it is liable for an action of damages for a wrongful refusal, and, in addition, for the indignity, vexation and disgrace, if there is any evidence of such. *Patterson v. Steamship Co.,* 412.

CATTLE GUARDS.

Section 2601, Revisal, which requires railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands, applies to a town lot as well as in the country and to stock law and non-stock law territory. *Shepard v. Railroad,* 391.

CATTLE RUNNING AT LARGE.

In an action to recover the penalties provided in section 2319 of The Code for illegally ranging cattle and sheep in Swain County, in order to justify the defendants in ranging their cattle and sheep the burden is upon them to show that they own an estate in land in said county for one year or other higher estate and the question of the defendants' good faith and *bona fide* claim of title to land does not enter into the case. *Rose v. Davis,* 266.

Under section 2319 of The Code, if a non-resident owns an estate in land in the county, for one year or other higher estate, he may bring into the range twenty head of the beast mentioned. If he brings in more than twenty, he must show such an estate in two hundred acres of land for every additional twenty head. *Rose v. Davis,* 266.

CAVEAT EMPTOR. See "Fraud."

CESTUI QUE TRUST. See "Trusts and Trustees."

CHARGE. See "Instructions."

CHEROKEE LANDS.

The manner of entry, terms of payment, etc., of the "Cherokee Lands" are governed by the provisions of chapter 11 of The Code, and section 2766 of chapter 17, providing that the failure to pay the purchase money, within the time prescribed after entry, works a forfeiture, does not apply to the Cherokee Lands. *Frasier v. Gibson*, 272.

The terms upon which the "Cherokee Lands," when entered, revert to the State, are "in case of failure to pay the whole when due and the money cannot be obtained by judgment" on the bonds, and the enterer has a reasonable time within which to pay his bonds and assert his right. *Frasier v. Gibson*, 272.

A status is established between the State and an enterer of the Cherokee Lands by which he becomes a purchaser; the enterer of other lands acquires a mere option to buy. *Frasier v. Gibson*, 272.

Under chapter 11 of The Code, when one entered the "Cherokee Lands," on December 11, 1879, and filed his bonds for the purchase money on February 20, 1880, and paid same December 1, 1884, and obtained grant on August 17, 1885, *held*, the entry had not lapsed. *Frasier v. Gibson*, 272.

Forfeitures are not favored by the law and when incurred can only be enforced in the manner pointed out in the contract to enforce them. *Frasier v. Gibson*, 272.

The burden is upon the plaintiff to show that a prior entry was invalid for indefiniteness, for in the absence of any proof to the contrary, the court must assume that the entry and survey conformed to the statute. *Frasier v. Gibson*, 272.

In an action by one who claims as enterer of "Cherokee Lands," the cause of action is barred in ten years from the registration of the grant. *Frasier v. Gibson*, 272.

CHURCHES.

The provisions of Revisal, sections 2670-1, which confer upon any church the right to appoint trustees to hold its property and to fill vacancies, etc., apply only to such property and not to property held in trust for a "Baptist church and for the education of the youths of the colored race." *Thornton v. Harris*, 498.

In a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust for the same beneficial owner, the title does not come in controversy. *Thornton v. Harris*, 498.

CHURCHES—*Continued.*

Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," their successors will be appointed under Revisal, section 1037, by the clerk of the court. *Thornton v. Harris*, 498.

Where a deed conveyed property "in trust for purposes of a school house for the education of freedmen and children irrespective of race," a lease of the property by the trustees for 200 years "to be used as a Baptist church and for the education of the youths of the colored race," is wholly unauthorized and in violation of the power conferred by the deed. *Thornton v. Harris*, 498.

CITIES. See "Municipal Corporations."

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Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," their successors will be appointed under Revisal, section 1037, by the clerk of the court. *Thornton v. Harris*, 498.

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CONDEMNATION PROCEEDINGS. See "Eminent Domain."

CONFESSION AND AVOIDANCE.

A defense in the nature of a plea in confession and avoidance must be specially pleaded. *Smith v. Newberry,* 385.

CONFIRMATION. See "Judicial Sales."

CONSIDERATION.

The release of controverted claims constitutes a valuable consideration. *Lipschutz v. Weatherly,* 365.

A contract may be discharged by an express agreement that it shall no longer bind either party, provided it is supported by a valuable consideration, which may be either a payment in money, something of value, or by a release of mutual obligations arising out of the contract. *Lipschutz v. Weatherly,* 365.

Where the defendant consented to the substitution of a new contract, the terms of which differed from the original, the release of the obligations of the old and the substitution of new obligations constitute valuable considerations. *Lipschutz v. Weatherly,* 365.

CONSIGNMENTS. See "Conversion."

CONSTITUTION OF N. C. See "Constitutional Law."

Art. II, sec. 14. Law Imposing Taxes. *Fortune v. Com.,* 329.
Art. IV, sec. 8. Jurisdiction of Supreme Court. *Brown v. Power Co.,* 348.
Art. V, sec. 1. Poll Tax. *Pace v. Raleigh,* 67.
Art. V, sec. 2. Poll Tax. *Crocker v. Moore,* 432.
Art. VI, sec. 1-4. Qualification of Voter. *Pace v. Raleigh,* 67.

CONSTITUTION OF N. C.—*Continued.*

Art. VII, sec. 2. Roads. *Crocker v. Moore,* 433.
Art. VII, sec. 7. Taxes for Necessary Expenses. *Crocker v. Moore,* 433.
Art. VII, sec. 14. Legislative Power. *Crocker v. Moore,* 433.
Art. IX, sec. 2. School Facilities. *Lowery v. School Trustees,* 39-47.
Art. X, sec. 3. Liens for Work and Labor. *Ball v. Paquin,* 95.
Art. X, sec. 4. Mechanic's and Laborer's Liens. *Isler v. Dixon,* 530.
Art. X, sec. 6. Property of Married Women. *Ball v. Paquin,* 88-97-8.
Art. X, sec. 8. Privy Examination. *Ball v. Paquin,* 97.

CONSTITUTIONAL LAW.

Courts never assume that the Legislature intended to pass an unconstitutional act—they may resort to an implication to sustain an act, but not to destroy it. *Lowery v. School Trustees,* 33.

If the general scope and purpose of a statute are constitutional, and constitutional means are provided for executing such general purposes, the entire statute will not be declared void, because some one or more of the details prescribed, or minor provisions incorporated, are not in accordance with the Constitution, provided such invalid parts may be eliminated, without destroying or materially affecting the general purpose. *Lowery v. School Trustees,* 33.

So much of section 7, of the Act of 1905, (Pr.) chapter 11, as undertakes to distinguish between the races in regard to the money apportioned from the public school fund is invalid. This, however, does not affect the other portions of the act. *Lowery v. School Trustees,* 33.

When a duty is imposed and power conferred upon a public agency, by necessary implication, the duty and power to do the thing in the manner directed by the Constitution, attach. *Lowery v. School Trustees,* 33.

The provisions in the Act of 1903 appropriating to the road fund one-half of the net proceeds of the dispensary is valid and the money should be paid to the road fund, even though other parts of the act were unconstitutional. *Crocker v. Moore,* 429.

The objection that the Act of 1903 takes the power of levying taxes for road purposes out of the hands of the county commissioners is without merit. The act provides merely that the board of road commissioners shall ascertain and decide as to the amount

CONSTITUTIONAL LAW—*Continued.*

needed for working the road and the rate necessary to raise that sum, and report to the board of county commissioners, who shall levy the taxes. *Crocker v. Moore,* 429.

The fact that the road commissioners, under Act of 1903, chapter 538, may report an amount, which, added to the other necessary taxes, will exceed the constitutional limitation, does not render the statute invalid. *Crocker v. Moore,* 429.

The objection to the constitutionality of the Act of 1903, chapter 538, in that the act applies a part of the county capitation tax to the use of the public roads in violation of the Constitution, Article V, section 2, which appropriates the State and County poll tax "to the purpose of education and the support of the poor," cannot be sustained, as that provision applies to the levy of taxation for general, not special, purposes. *Crocker v. Moore,* 429.

Working the roads is a necessary expense and the act authorizing the county commisisoners to levy a tax for such purpose without a vote of the people is valid under Article VII, section 7, of the Constitution. *Crocker v. Moore,* 429.

Under section 14 of Article VII of the Constitution, the General Assembly is given power to modify, change or abrogate all the provisions of Article VII, except sections 7, 9 and 13. *Crocker v. Moore,* 429.

Where the work done on a house and furnishing the material were all in the same contract, which was entire and indivisible, the contractor is entitled to a lien for the whole amount under the "mechanic's and laborer's lien law," and the judgment is superior to the homestead and personal property exemption. *Isler v. Dixon,* 529.

CONSTRUCTIVE NOTICE. See "Entries and Grants."

CONSTRUCTIVE POSSESSION. See "Trespass."

CONSTRUCTION OF STATUTES. See "Statutes."

CONTINUANCES.

Where a justice of the peace received an affidavit to set aside a judgment rendered against the defendant more than ten days after its rendition and thereupon made an *ex parte* order setting aside the judgment and directing a rehearing, the plaintiff, by procuring a continuance on the date set for the rehearing, did not waive any of his rights. *Bullard v. Edwards,* 644.

CONTRACTS. See "Married Women, Contracts of;" "Insurance."

The meaning of the terms of a contract whether written or verbal, when they are precise and explicit, is a question for the court, but if doubtful and uncertain, they may be submitted to the jury, with proper instructions, to ascertain the meaning and intent of the parties. *Wilson v. Cotton Mills*, 52.

If the parties to an agreement dispute about its terms, an issue of fact is raised, as to the terms, to be decided by the jury who should be guided by instructions from the court. *Wilson v. Cotton Mills*, 52.

Where the plaintiffs sold cotton to the defendant in March with the stipulation to deliver at their option in April, May or June, and on June 18 the defendant asked for an extension of the time fixed for delivery to July 8, which was not granted absolutely, and on June 25 the defendant ordered the plaintiffs to sell the cotton, when the price for July reached 11¼ cents or more, *held*, that this was a direction to hold the cotton for sale in July at not less than the price stated, and a refusal to take the cotton on July 23 was a breach of contract. *Wilson v. Cotton Mills*, 52.

Where the defendant had refused to take the cotton on July 23, this was a breach of its contract and it is immaterial that the plaintiffs shipped the cotton on the 29th, as they were not required to make any delivery, the refusal dispensing in law with any tender, and the plaintiffs being entitled to recover if they were ready, willing and able to deliver and otherwise comply with the contract on their part. *Wilson v. Cotton Mills*, 52.

In an action for the price of cotton sold, the loss in weight should not have been deducted in assessing the damages, as it appears from the defendant's letter that a loss "not to exceed three pounds per bale from the invoice weight" was to be allowed. *Wison v. Cotton Mills*, 52.

A contract to pay for labor and material contracted for a dwelling on the wife's land (describing it) signed by husband and wife, acknowledged by them, and with privy examination of the wife, is binding upon her separate real estate under section 1826 of The Code by necessary implication, though she does not expressly charge it upon her estate. *Ball v. Paquin*, 83.

The contracts of idiots, lunatics and other persons *non compos* are generally regarded, in a certain sense, as invalid. *Sprinkle v. Wellborn*, 163.

In regard to a contract entered into by a person apparently sane, before the fact of insanity has been established, such a contract

CONTRACTS—*Continued.*

is at most only voidable and will not be set aside when the other party to be affected by the decree of the court had no notice of the fact of insanity, has derived no inequitable advantage, and the parties cannot be placed *in statu quo*. *Sprinkle v. Wellborn*, 163.

The mere fact that a man is of weak understanding, is not of itself an adequate ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance. But where mental weakness is accompanied by other inequitable incidents—such as undue influence, great ignorance and want of advice, or inadequacy of consideration—equity will interfere and grant either affirmative or defensive relief. *Sprinkle v. Wellborn*, 163.

In the case of an insane person, one wholly incompetent to contract, the law presumes fraud from the condition of the parties, the presumption being stronger or weaker, according to the position or condition of the parties with respect to each other. *Sprinkle v. Wellborn*, 163.

A person has mental capacity sufficient to contract if he knows what he is about and the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, not that he should be able to act wisely or discreetly nor to drive a good bargain, but he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly. *Sprinkle v. Wellborn*, 163.

Parties to a written contract may by parol rescind or by matter *in pais* abandon the same. *May v. Getty*, 310.

What will amount to an abandonment of a contract is a question of law and the acts and conduct which are relied on to constitute the abandonment should be cleary proved, and they must be positive, unequivocal and inconsistent with the existence of a contract, but when thus established they will bar the right to specific performance. *May v. Getty*, 310.

Where it appears that the vendee, in a contract for the sale of property at $2,350.00 had never paid any money, other than $100, paid on the date of the contract and never demanded a deed and two years after the execution of the contract, left the State and has never since exercised any ownership or had possession of the property, and that he told the vendor twelve or thirteen years ago that he did not think he could pay for it and if he could make his money out of the property, to go ahead and do so, and that he left the property with the intention of

CONTRACTS—*Continued.*

relinquishing all rights, *held*, these facts are sufficient to show a rescission and abandonment of the contract. *May v. Getty*, 310.

The interest of a vendee in a contract for the purchase of property who has paid a part of the purchase money, is not the subject of sale under execution. *May v. Getty*, 310.

In an action for the specific performance of a contract to convey, if the plaintiff can give a perfect title at the time of the trial, it is sufficient to induce a court of equity to compel performance of the contract. *May v. Getty*, 310.

The principle, that false representations as to material facts knowingly and wilfully made as an inducement to the contract and by which the same was effected, reasonably relied upon by the other party and causing pecuniary damage and constituting an actionable wrong, applies to contracts and sales of both real and personal property. *May v. Loomis*, 350.

A contract may be discharged by an express agreement that it shall no longer bind either party, provided it is supported by a valuable consideration, which may be either a payment in money, something of value, or by a release of mutual obligations arising out of the contract. *Lipschutz v. Weatherly*, 365.

Where the defendant consented to the substitution of a new contract, the terms of which differed from the original, the release of the obligations of the old and the substitution of new obligations constitute valuable considerations. *Lipschutz v. Weatherly*, 365.

Where the defendant consented to the cancellation or rescission of the original contract, in consideration of a substituted contract, his right to recover damages which had occurred prior to such rescission was waived or surrendered. *Lipschutz v. Weatherly*, 365.

The statute of frauds (Rev., sec. 974,) does not forbid an oral contract to assume the debt of another, who is thereupon discharged of all liability to the creditor, the promisor thus becoming sole debtor in his place and stead. *Jenkins v. Holley*, 379.

Where the jury found that the plaintiffs were employed by the defendant as attorneys to represent him and take care of his interest, and that they rendered services to him under the contract, they were entitled to recover what their services were reasonably worth, there being no stipulation as to the amount the plaintiffs were to receive; and it makes no difference

CONTRACTS—*Continued.*

whether the issue "Did defendant knowingly accept the benefit of such services?" was answered or not. *Simmons v. Davenport*, 407.

The following telegram sent by defendant's general road master to plaintiff "Can offer you extra force at $65 per month. Will want you at once to ditch D. & N. Road and R. & G. Answer quick. Job will last all the year," constituted an offer of employment for the remainder of the year, which became binding upon acceptance. *King v. Railroad*, 433.

The above special contract of employment was not affected by the rules of defendant company, known to plaintiff, that its servants are employed by the month subject to be discharged at its will. *King v. Railroad*, 433.

In an action to recover damages for breach of contract in failing to deliver goods having a market value, the general rule for the measure of damages is the difference between the contract price and the market value "at the time when and place where they should have been delivered." *Hosiery Co. v. Cotton Mills*, 452.

Where, by the terms of the contract, the goods are to be delivered by instalments or at stated periods, the time of delivery will be the date for the delivery of each instalment successively, the damage being the aggregate of these differences estimated as of these respective dates, and interest where allowed. *Hosiery Co. v. Cotton Mills*, 452.

This rule generally obtains, though the last period for delivery had not elapsed when the action was brought or the cause tried. *Hosiery Co. v. Cotton Mills*, 452.

Where, however, the date of delivery has been postponed by agreement of the parties or at the request of the bargainor and for his convenience, acquiesced in and assented to by the bargainee, in such case, the time of delivery will be at the subsequent date and the damages estimated as of that date. *Hosiery Co. v. Cotton Mills*, 452.

A contract to cut all timber of an indicated measurement on certain land, for a fixed period, passes a present estate in the timber defeasible as to all timber not cut within the limit of the time fixed. *Lumber Co. v. Corey*, 462.

The fact that the plaintiff did not sign the contract so as to become in law bound for the payment of the purchase money does not prevent the contract from being a bilateral one, instead of a mere option. *Lumber Co. v. Corey*, 462.

CONTRACTS—*Continued.*

To make a contract to sell growing trees binding on the vendor, it is sufficient that the contract be signed by him, and it is not necessary that it should be signed by the vendee. *Lumber Co. v. Corey*, 462.

The words of a contract, "all the pine timber that will measure twelve inches at the stump, eighteen inches above the ground, when cut," mean all timber standing on the land which are found to be not less in diameter than 12 inches by measurement to be made 18 inches from the ground, at the time the trees are reached in the process of cutting. *Lumber Co. v. Corey*, 462.

A paper writing, by which the defendant binds himself at any time previous to a fixed date, to sell a certain tract of land to anyone whom the plaintiff may direct for a designated sum, is a unilateral contract or an option, where the plaintiff has never obligated himself to pay said sum. *Alston v. Connell*, 485.

Where the parties made a contract for the sale of certain timber, reserving a well defined class of trees, and defendant undertook to reduce the contract to writing, in accordance with its terms, but knowingly included the reserved timber and falsely represented to plaintiff that said timber was reserved in the deed, and by means of this false representation, procured the execution of the deed, the plaintiff has a cause of action for deceit, and this is not dependent upon the removal of the timber. *Griffin v. Lumber Co.*, 514.

Where the defendants agreed to deliver a certain quantity of tobacco f. o. b. cars in Raleigh on July 1, to the plaintiffs, who agreed to receive and pay for it at that time, and neither party was ready to comply on that day, but both were able to comply on 4 July, when the plaintiffs made a demand which was refused and there was no extension of time, plaintiffs are not entitled to recover the tobacco. *Hughes v. Knott*, 550.

Neither party to a contract can demand performance by the other without alleging and proving his own readiness to perform his part of the contract at the specified time and place. *Hughes v. Knott*, 550.

Where a contract calls for the delivery of goods "immediately," the party is entitled to a reasonable time to deliver them. *Claus v. Lee*, 552

When the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. *Redding v. Vogt*, 562.

CONTRACTS—*Continued.*

Where, by the first contract to convey, a party acquired absolutely the entire estate in one-half of a tract of land, and by the second contract he was given one-half interest subject to a life estate in that tract and other land, and took a deed in execution of the last contract, and thereupon entered into possession of the land and conveyed a part of it, the last contract and deed must be regarded as a substitute for the first contract and as a rescission of it, the two transactions being wholly irreconcilable, and those claiming under him must abide by its terms. *Redding v. Vogt*, 562.

CONTRIBUTORY NEGLIGENCE. See "Negligence."

A finding by the jury, that the plaintiff's intestate was guilty of contributory negligence, makes it unnecessary to consider an exception to a refusal of a prayer of defendant as to contributory negligence. *Edwards v. Railroad*, 49.

Where plaintiff's intestate had gone to the crossing at Third street in an effort to cross the railroad and was told by an employee of the defendant that a freight train then obstructed the crossing at that point, and that she had better try the Second street crossing, and following these instructions she essayed the latter crossing and was endeavoring to cross when an engine backed upon her and death resulted, *held*, that the intestate was no trespasser and there was no contributory negligence in the mere fact that she was then upon the road. *Reid v. Railroad*, 146.

Evidence tending to show that the intestate was in a covered wagon and that he drove on the crossing without any stop whatever and with the wagon cover down on the side from which the train approached and at a point just on the edge of the wagon road and 13 feet from the center of the railroad track one could see down the track from 500 to 1,200 feet, in the direction from which the trains approached, was sufficient for the consideration of the jury on the issue of contributory negligence. *Cooper v. Railroad*, 209.

Where the view is unobstructed, a traveler, who attempts to cross a railroad track under ordinary and usual conditions without first looking, when, by doing so, he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence. *Cooper v. Railroad*, 209.

Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be

CONTRIBUTORY NEGLIGENCE—*Continued.*

attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence. *Cooper v. Railroad*, 209.

There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether as when gates are open or signals given by a watchman and the traveler enters on the crossing reasonably relying upon the assurance of safety. *Cooper v. Railroad*, 209.

One who enters on a public railroad crossing is required to look and listen, and when he fails in this duty and is injured in consequence, the view being unobstructed, under ordinary conditions such person is guilty of contributory negligence. *Sherrill v. Railroad*, 252.

Negligence having first been established, facts and attendant circumstances may so qualify the obligation to look and listen, as to require the question of contributory negligence to be submitted to the jury, and in some instances, the obligation to look and listen may be altogether removed. *Sherrill v. Railroad*, 252.

The above principle, with its limitations, applies with peculiar force to those whose duties, by contract with the railroad, call them to work on or upon the tracks or frequently to cross the same. *Sherrill v. Railroad*, 252.

Where the testimony of the plaintiff tended to show that his duties by contract with the defendant railroad caused him to work almost on the track and frequently required him to be upon and across it, and that while so engaged he was run over by an engine of the defendant which had come upon him without any warning, and which warning was required both by the custom and rules of the railroad, and that he had just looked and listened both ways, and the way then appeared clear, *held*, that a nonsuit was erroneous as the question of contributory negligence must be left to the jury to determine under proper instructions. *Sherrill v. Railroad*, 252.

In an action for personal injuries, an instruction on the issue as to contributory negligence that "if the plaintiff was asleep and was thrown off the car by a sudden jerk caused by the negligence of the engineer or by pulling out the slack, and that said slack was the result of having no brakes on the cars, then the jury should answer the issue 'no,'" is erroneous, for if the neg-

CONTRIBUTORY NEGLIGENCE—*Continued.*

ligence of the plaintiff in going to sleep on a moving train concurred with the defendant's negligence as the proximate cause of the injury, this would be contributory negligence. *Sledge v. Lumber Co.*, 459.

If the plaintiff knew that the standard was gone when he mounted the loaded car, and if in consequence thereof the danger to himself was so obvious that no man of ordinary prudence would have ridden on it, then the plaintiff did assume the risk and would be guilty of such contributory negligence as would bar a recovery. *Tanner v. Lumber Co.*, 475.

In an action for damages for personal injuries, where the evidence showed that the machine was an ordinary circular saw, which was securely fastened on a table five feet square and worked all right, and that there was nothing requiring special instruction, and that plaintiff was injured by running his hand under the table to clean out the saw dust box, without looking where he put it and could have easily seen the saw whirling under the table by stooping down and looking, *held*, the court erred in overruling a motion of nonsuit. *Mathis v. Mfg. Co.*, 530.

CONVERSION.

In an action for the unlawful conversion of the proceeds of certain buggies alleged to have been received under a contract of consignment, where the complaint sets out the entire transaction and defendant makes no point of the fact that his promissory notes given for the price of the buggies, are not tendered at the trial, but simply denies that he received the buggies upon the contract, and the jury have found the issue against him, his contention that plaintiff cannot retain his notes and at the same time prosecute an action against him for the amount received by him as agent, is without merit. *Buggy Co. v. Dukes*, 393.

CORPORATION COMMISSION.

Under sub-head 15 of section 2, chapter 164, Laws 1899, authorizing the Corporation Commission to require the construction of sidetracks to industries when the revenue accruing from such sidetrack is sufficient within five years to pay the expenses of its construction, an order requiring the railroad to construct a spur siding for the use of a lumber plant to hold four cars, about one and a quarter miles from a station, is not unreasonable, where it appears that the lumber shipped from said siding in two years would yield a revenue of $6,000.00 to the railroad, and the cost to the defendant of constructing it (the grading and crossties being furnished by the lumber company) would be about $200.00. *Corporation Com. v. Railroad*, 239.

CORPORATIONS. See "Municipal Corporations."

COUNTY COMMISSIONERS. See "Roads;" "Taxation."

COUNTERCLAIM. See "Pleadings."

COURSE AND DISTANCE. See "Boundaries;" "Processioning;" "Deeds."

COURTS, POWER OF.

This court has unquestioned power to set a verdict aside when there is no evidence to support it. *Brown v. Power Co.*, 333.

An agreement empowering the judge to sign judgment "out of term," gave him no power after the adjournment of the term to hear and pass upon a motion to set the verdict aside. *Knowles v. Savage*, 372.

Judicial sales are only conditional and are not complete until they have been reported to and confirmed by the court; and the bid may be rejected and the sale set aside, if, in the exercise of its sound discretion, the court should think proper to do so. *Harrell v. Blythe*, 415.

This court has no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them. *Boyle v. Stallings*, 524.

COVERTURE. See "Limitation of Actions;" "Married Women, Contracts of;" "Justices of the Peace."

CROSSINGS. See "Railroads."

CURTESY. See "Husband and Wife."

CUSTOM.

Where the defendant was permitted to prove the custom of the conductor in regard to taking up tickets and checking passengers from all stations, the testimony of witnesses that this conductor had on previous occasions called upon each of them for a ticket after it had been surrendered to him, was competent for the purpose of rebutting this custom and showing its fallibility. *Parrott v. Railroad*, 546.

DAMAGES. See "Telegraphs;" "Eminent Domain;" "Market Value."

In an action for the price of cotton sold, the loss in weight should not have been deducted in assessing the damages, as it appears from the defendant's letter that a loss "not to exceed three pounds per bale from the invoice weight" was to be allowed. *Wilson v. Cotton Mills*, 52.

DAMAGES—*Continued.*

In an action to recover insurance premiums, where the verdict establishes the fact that the insurance was obtained by the false representation of defendant's agent, the measure of relief is the amount paid with interest. *Caldwell v. Insurance Co.*, 100.

On the question of damages, the court correctly instructed the jury that if the conductor maliciously or with wanton recklessness carried the plaintiff by her station, or if he maliciously or wantonly mistreated and humiliated her, they could assess punitive damages. *Hutchinson v. Railroad*, 123.

Under section 1963 of The Code, when a passenger is carried by his station, he is entitled to damages, and this, though there is no bodily harm, or actual damages. *Smith v. Railroad*, 130 N. C., 304, overruled. *Hutchinson v. Railroad*, 123.

The general rule in the law of damages is that all damage resulting from a single wrong or cause of action must be recovered in one suit. *Eller v. Railroad*, 140.

Where the defendant did not know of the intended marriage, the male plaintiff has no cause of action for the defendant's negligence in the delivery of the *feme* plaintiff's baggage containing her trousseau. In this case the damage claimed was not in the contemplation of the parties and too remote. *Eller v. Railroad*, 140.

In an action against a railroad for an alleged wrongful ejection, to entitle a passenger to punitive damages, his expulsion from the train must be attended by such circumstances as tend to show rudeness, insult, aggravating circumstances calculated to humiliate him. *Ammons v. Railroad*, 196.

When, for the purpose of meeting and providing for a public necessity, the citizen is compelled to sell his property or permit it to be subjected to a temporary or permanent burden, he is entitled by way of compensation, to its actual market value. *Brown v. Power Co.*, 333.

If a tract of which the whole or a part is taken for a public use, possesses a special value to the owner, which can be measured by money, he is entitled to have that value considered in the estimate of compensation and damages. *Brown v. Power Co.*, 333.

The court properly submitted to the jury the evidence tending to show that plaintiff had water power on the river to be considered as an element of value. *Brown v. Power Co.*, 333.

Where the defendant consented to the cancellation or rescission of the original contract, in consideration of a substituted con-

DAMAGES—*Continued.*

tract, his right to recover damages which had occurred prior to such rescission was waived or surrendered. *Lipschutz v. Weatherly*, 365.

In an action for damages for breach of warranty, where defendant's evidence was material to be considered by the jury upon the issue in regard to damages, a charge, that the jury might consider this evidence in making up their minds as to whether there was a warranty and a breach thereof, is reversible error. *Smith v. Newberry*, 385.

A common carrier must serve the public without discrimination and sell its tickets and accommodations in the order of application, and it is liable for an action of damages for a wrongful refusal, and, in addition, for the indignity, vexation and disgrace, if there is any evidence of such. *Patterson v. Steamship Co.*, 412.

In an action brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where it appeared that the entire wrong was done in 1898 and 1899, the action was barred under Revisal, section 395, sub-section 3. *Cherry v. Canal Co.*, 422.

In an action for damages for trespass committed in cutting timber, where the plaintiff relied alone on constructive possession arising out of its paper title which it alleged covered the land upon which the cutting was done, and where the jury found that the defendant had not trespassed and therefore that the plaintiff had no title to the *locus in quo*, this finding of the jury and the judgment of the court in accordance therewith are a complete bar to a motion in the action by plaintiff for the assessment of damages claimed by him to have accrued from a continuance of the same alleged trespass since the action was commenced, and this is true, though the plaintiff recovered nominal damages by reason of an agreement of counsel admitting a technical trespass. *Lumber Co. v. Lumber Co.*, 437.

While the act of entering upon land and cutting timber constitutes a continuing trespass for which successive actions may be brought, the plaintiff recovering damages in each to the date of his writ, yet this principle does not apply, so as to prevent a bar, where the plaintiff has failed to prove the unlawful entry or to show his possession, either actual or constructive, of the land upon which he alleges the defendant trespassed. *Lumber Co. v. Lumber Co.*, 437.

In an action to recover damages for breach of contract in failing to deliver goods having a market value, the general rule for

DAMAGES—*Continued.*

the measure of damages is the difference between the contract price and the market value "at the time when and place where they should have been delivered." *Hosiery Co. v. Cotton Mills,* 452.

Where, by the terms of the contract, the goods are to be delivered by instalments or at stated periods, the time of delivery will be the date for the delivery of each instalment successively, the damage being the aggregate of these differences estimated as of these respective dates, and interest where allowed. *Hosiery Co. v. Cotton Mills,* 452.

This rule generally obtains, though the last period for delivery had not elapsed when the action was brought or the cause tried. *Hosiery Co. v. Cotton Mills,* 452.

Where, however, the date of delivery has been postponed by agreement of the parties or at the request of the bargainor and for his convenience, acquiesced in and assented to by the bargainee, in such case, the time of delivery will be at the subsequent date and the damages estimated as of that date. *Hosiery Co. v. Cotton Mills,* 452.

An instruction, on the issue as to damages, that the jury, having determined the decreased earning capacity for a year, must multiply that sum by the expectancy of the plaintiff as fixed by mortuary tables, is erroneous, in that it makes the mortuary tables conclusive as to the plaintiff's expectancy. *Sledge v. Lumber Co.,* 459.

In an action for deceit in falsely securing the execution of a deed, conveying timber which was reserved, where the defendant requested the court to instruct the jury that the extent of his liability was the "market" value of the timber at the date of the deed, there was no error committed in giving the instruction with the word "market" stricken out, the court saying, that while the market value should be considered as evidence of its value, it should not control—the question was what was its real value. *Griffin v. Lumber Co.,* 514.

When the right of a party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete. The recovery in such a case will embrace all damages resulting from the wrongful act. *Mast v. Sapp,* 533.

Where the wall of a city reservoir was undermined and fell, by reason of its faulty construction, on the lot of defendant's intestate and struck her house, the first injury was sustained and the wrong was complete just as soon as the wall fell and

DAMAGES—*Continued.*

struck her house, and her cause of action immediately arose for all ensuing damage of which the injurious act was the efficient cause. *Mast v. Sapp*, 533.

If the injury developed in the lifetime of defendant's intestate, who was killed in the house and the damage followed in an unbroken sequence as the direct and proximate result of it, the defendant administrator is entitled to recover the fund paid by the city for the property destroyed belonging to his intestate. *Mast v. Sapp*, 533.

If the destruction of the house and the death of the intestate occurred at one and the same instant of time, the heir would not be entitled to the fund in dispute. *Mast v. Sapp*, 533.

In an action to recover damages for wrongful ejection, where the evidence showed that the plaintiff, who was a passenger, was wrongfully put off the defendant's train at night in the country, and that the conductor and brakeman took hold of him and forcibly ejected him in the presence of other passengers, and that the conductor was rude, stern, harsh and humiliating in his demeanor towards plaintiff, the court did not err in submitting the assessment of punitive damages to the jury. *Parrott v. Railroad*, 546.

In an action for damages for the negligent burning of plaintiff's factory, evidence that plaintiffs had a contract to deliver a certain number of crates at a fixed profit; that they had on hand the material to complete this contract at the date of the fire, and that it was impossible to replace this material, was competent to be heard by the jury upon the issue of damages. *Johnson v. Railroad*, 574.

When the cause of action is based upon a wrongful invasion of plaintiff's rights of person or property, he may recover all such damages, either direct or consequential, as flow naturally and proximately from the trespass, whether they could or could not have been anticipated. *Johnson v. Railroad*, 574.

Where the profits lost by defendant's tortious conduct, proximately and naturally flow from his act and are reasonably definite and certain, they are recoverable; those which are speculative and contingent, are not. *Johnson v. Railroad*, 574.

DEATH.

Where a cause of action for damages to land accrued in the lifetime of the testator or intestate, or in other words, the injury was committed during that time, it survives to his executor or

DEATH—*Continued.*

administrator; if it was committed after his death, the right of action would belong to the heir or devisee. *Mast v. Sapp,* 533.

If the injury developed in the lifetime of defendant's intestate, who was killed in the house and the damage followed in an unbroken sequence as the direct and proximate result of it, the defendant administrator is entitled to recover the fund paid by the city for the property destroyed belonging to his intestate. *Mast v. Sapp,* 533.

In a contest between the heir and the personal representative to determine the rightful claimant to a fund paid by the city for destroying the intestate's house by its reservoir falling and crushing it, the question is not whether the intestate survived the destruction of her property, but whether the injury was committed before or after her death. *Mast v. Sapp,* 533.

If the destruction of the house and the death of the intestate occurred at one and the same instant of time, the heir would not be entitled to the fund in dispute. *Mast v. Sapp,* 533.

DEBT OF THIRD PERSON. See "Statute of Frauds."

DECEIT. See "Fraud."

DECLARATIONS. See "Evidence;" "Husband and Wife."

DECLARATIONS AGAINST INTEREST.

A declaration against interest made by a party in possession in disparagement of his title is competent against the defendant who claims under him. *Norcum v. Savage,* 472.

DECLARATIONS AS TO BOUNDARIES. See "Boundaries."

DEEDS. See "Boundaries;" "Ejectment."

Whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance specified. *Hill v. Dalton,* 9.

Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land. *Hill v. Dalton,* 9.

In an action to set aside a deed for mental incapacity and fraud, under a finding that one of the defendants was a purchaser from his co-defendant for value and without notice of the mental incapacity of the grantor, and also without notice of any

DEEDS—*Continued.*

fraud of his co-defendant in procuring the deed, the plaintiff could not proceed further against such defendant and the cause was properly continued against the other defendant upon the theory that he is liable for the value of the land, less the amount paid by him therefor. *Sprinkle v. Wellborn*, 163.

In an action to set aside a verdict for mental incapacity, where it appears that the defendant was a kinsman and neighbor of the grantor and had known her all his life, and that at the time she made the trade with him, she was wild and hardly seemed to know her whereabouts, that he procured the deed away from her home, having taken her away from those who could have advised her and falsely stated that he was going on another matter, that she suddenly changed her mind and was so weak as to be completely subjected to his power and dictation, *held*, this evidence is sufficient to support the finding that the defendant had notice of the grantor's incapacity at the time she made the deed to him, the jury not being bound by his statement that he did not know she was insane. *Sprinkle v. Wellborn*, 163.

In an action to set aside a deed for mental incapacity and for fraud, the finding of the jury that the grantor did not have sufficient mental capacity and that the grantee had notice of this fact, is sufficient to invest the court with the power and to induce it to set aside the deed, if no real injustice is done to the grantee and no superior equity has intervened in favor of a third party, the granting of the relief resting in the sound discretion of the court. *Sprinkle v. Wellborn*, 163.

In an action to set aside a deed for mental incapacity, the record in the case in which plaintiff's marriage was annulled on the ground that she did not have sufficient mental capacity to enter into the contract of marriage was incompetent as substantive testimony and properly excluded. *Sprinkle v. Wellborn*, 163.

In an action to set aside a deed for mental incapacity and for fraud where the jury found that there was not only a want of mental capacity, but that defendant knew of it and that he obtained the land at an under-value, an issue as to fraud was not essential to warrant a judgment against the defendant for the difference between the price for the land and its value, and the action of the court in striking out the answer of the jury to the issue as to fraud and substituting one of its own resulted in no legal wrong to the defendant. *Sprinkle v. Wellborn*, 163.

Where the lines or corners of an adjoining tract are called for in a deed or patent, the lines shall be extended to them without

DEEDS—*Continued.*

regard to distance, provided these lines and corners be sufficiently established, and that no other departure be permitted from the words of the patent or deed, than such as necessity enforces or a true construction renders necessary. *Fincannon v. Sudderth*, 246.

Under the above rule, the words in a deed, "being a corner of a tract owned by S, and known as the J tract, and runs west with the line of the S tract 228 poles to a stake in the old D line," control the other contradictory calls for a "rock," etc., there being no evidence as to how the rock came to be at the point or how long it had been there. *Fincannon v. Sudderth*, 246.

The rule that whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the deed shall hold accordingly, notwithstanding a mistaken description of the land in the deed, presupposes that the deed is made in pursuance of the survey, and that the line was marked and the corner that was made in making the survey was adopted and acted upon in making the deed. *Fincannon v. Sudderth*, 246.

When the line of another tract of land which is known and established is called for in a grant or deed, it will control a call by course and distance. *Whitaker v. Cover*, 280.

Ordinarily, the number of acres mentioned in a deed constitutes no part of the description, especially when there are specifications and localities given by which the land may be located. *Whitaker v. Cover*, 280.

In an action to vacate a deed on the ground of mental incapacity, there was no error in refusing plaintiff's prayer that "it requires more mental capacity to execute a deed than a will and while it is sufficient proof to show that a person knows the nature of the property he undertakes to will away and to whom he wills it, that amount of mental capacity alone will not be sufficient in a person undertaking to execute a deed." *Bond v. Manufacturing Co.*, 381.

To execute either a will or a deed the party must have sufficient mental capacity to understand what property he is disposing of, the person to whom he is giving or selling, and the purpose for which he is disposing of the property. *Bond v. Manufacturing Co.*, 381.

A deed to the right of way gives a railroad no more rights than it would have acquired by condemnation. *Shepard v. Railroad*, 391.

DEEDS—*Continued.*

Where a deed to the wife, who bought and paid for the land, was stolen or lost without registration, and after her death her husband procured another deed to be executed to himself, the husband held the land, by implication of law, as trustee for their children, subject to his life estate as tenant by the curtesy. *Norcum v. Savage*, 472.

Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," their successors will be appointed under Revisal, section 1037, by the clerk of the court. *Thornton v. Harris*, 498.

Where a deed conveyed property "in trust for purposes of a school house for the education of freedmen and children irrespective of race," a lease of the property by the trustees for 200 years "to be used as a Baptist church and for the education of the youths of the colored race," is wholly unauthorized and in violation of the power conferred by the deed. *Thornton v. Harris*, 498.

Before signing a deed the grantor should read it, or, if unable to do so, should require it to be read to him, and his failure to do so, in the absence of any fraud or false representation as to its contents, is negligence, for the result of which the law affords no redress, but when fraud or any device is resorted to by the grantee which prevents the reading, or having read, the deed, the rule is different. *Griffin v. Lumber Co.*, 514.

Where, by the first contract to convey, a party acquired absolutely the entire estate in one-half of a tract of land, and by the second contract he was given one-half interest subject to a life estate in that tract and other land, and took a deed in execution of the last contract, and thereupon entered into possession of the land and conveyed a part of it, the last contract and deed must be regarded as a substitute for the first contract and as a rescission of it, the two transactions being wholly irreconcilable, and those claiming under him must abide by its terms. *Redding v. Vogt*, 562.

DEFECT OF PARTIES. See "Parties;" "Judgments."

DEFECTIVE APPLIANCES. See "Master and Servant;" "Railroads."

DELIVERY. See "Reasonable Time;" "Contracts;" "Damages."

DEMURRER. See "Pleadings."

DESCENT AND DISTRIBUTION. See "Statute of Distribution."

The Act of 1866, chapter 40 (section 1842 of The Code), fixed the marital relations of former slaves, who were living together as

DESCENT AND DISTRIBUTION—*Continued.*

man and wife, providing that those who thus cohabited at the date of the ratification of the act should be deemed to have lawfully married, with a provision for acknowledgment before the clerk or justice of the peace. *Bettis v. Avery*, 184.

The Act of 1879, chapter 73 (Code, sec. 1281, rule 13), legitimates the plaintiff, the child of colored parents, who was born before the first day of January, 1868, and merely extended the child's right of inheritance to the estate of the father, which was before that restricted to the estate of the mother, but it does not transmit any title to the plaintiff, who is claiming the land in dispute as heir of an illegitimate first cousin. *Bettis v. Avery*, 184.

The plaintiff, who is a legitimate and is claiming under a collateral kinsman of her mother, is excluded from any benefit under rule 9 of section 1281 of The Code, which refers only to a lineal descendant from a mother to her illegitimate child and its descendants and not to any collateral descendant from her kindred to the child as her representative. *Bettis v. Avery*, 184.

The last clause of rule 9, section 1281 of The Code, excludes the right to inherit, as the representative of an illegitimate mother, any part of the estate of the latter's kindred, either lineal or collateral. *Bettis v. Avery*, 184.

The plaintiff, a legitimate, who does not claim directly from a brother or sister, or from the issue or heirs of either, but from an illegitimate first cousin, comes within neither the letter nor the reason of rule 10 of section 1281 of The Code. *Bettis v. Avery*, 184.

By virtue of the provisions of the Act of March 10, 1866, the relation of man and wife existing between former slaves, if continued until the passage of the act, culminated into a valid marriage and was legalized by the statute. *Nelson v. Hunter*, 598.

The Act of March 10, 1866, has a retroactive effect so as to legalize the relation from the beginning of it, thereby legitimatizing all of the offspring of the cohabitation born during the entire period, and conduct after the passage of the act could not render the offspring of the union illegitimate. *Nelson v. Hunter*, 598.

It was competent for the defendants to prove that after the war and prior to March 10, 1866, S returned to his former home and lived and cohabited with his former slave wife, but they could not prove this by general reputation. *Nelson v. Hunter*, 598.

DESCENT AND DISTRIBUTION—*Continued.*

There are two essential conditions of the Act of 1879, to-wit: A cohabitation subsisting at the birth of the child and the paternity of the party from whom the property claimed is derived. *Nelson v. Hunter*, 598.

DESCRIPTIONS. See "Deeds;" "Boundaries."

DEVASTAVIT. See "Executors and Administrators."

DILIGENCE.

Where a cause was removed at a party's request and he made no inquiry of the justice, to whom it was removed, as to when it would be tried, but relied upon the assurance of the officer of the court for such information, this was not due diligence. *Bullard v. Edwards*, 644.

DISPENSARIES.

The Act of 1903, chapter 538, which establishes a road system and appropriates to the road fund one-half the net proceeds of all dispensaries "now established or hereafter established" in Northampton County, applies to the dispensary established at Jackson under the Act of 1899, chapter 189, providing that one-third of the net proceeds shall go to the town and two-thirds to the public schools of the township. *Crocker v. Moore*, 429.

The power of the General Assembly over dispensaries in their creation, abolition and the application of their net proceeds is plenary. *Crocker v. Moore*, 429.

The provisions in the Act of 1903 appropriating to the road fund one-half of the net proceeds of the dispensary is valid and the money should be paid to the road fund, even though other parts of the act were unconstitutional. *Crocker v. Moore*, 429.

DISTRIBUTION, STATUTE OF. See "Statute of Distribution."

DOCKETING APPEALS. See "Appeal and Error."

DOWER.

The right to dower does not attach to the lands of the husband unless he was seized during the coverture, and the husband must have an estate of inheritance. *Redding v. Vogt*, 562.

Dower is not allowed in estates in reversion or remainder expectant upon an estate of freehold; and hence, if the estate of the husband be subject to an outstanding freehold estate, which remains undetermined during the coverture, no right of dower attaches. *Redding v. Vogt*, 562.

The actual possession of land does not in itself constitute seizin. *Redding v. Vogt*, 562.

EASEMENT. See "Railroads."

EJECTMENT. See "Deeds."

In an action to recover lands and for damages for a trespass thereon, where the defendant denied the allegations of the complaint and alleged mutual mistake as a foundation for correcting the deed, but no issue was submitted by the court or tendered by the defendant upon this equitable defense, it was error to admit evidence of the alleged mistake. *Manufacturing Co. v. Cloer*, 128.

In an action of ejectment, it makes no difference whether the defendant has any title or not, for the plaintiff can succeed only on the strength of his own title as being good against the world or good against the defendant by estoppel. *Bettis v. Avery*, 184.

In an action for the recovery of land if the defendant wishes to disclaim as to any portion of the *locus in quo* and put in issue the title to only a specific portion, he should do so in his answer. *Crawford v. Masters*, 205.

In an action for the recovery of land the judgment must follow and conform to the verdict in designating the extent of the recovery, and must be rendered for the premises described in the complaint. *Crawford v. Masters*, 205.

Chapter 773, Acts 1905, by doing away with the necessity of proving that title to land in Hertford County is out of the State does not go further and provide that the title should be presumed to be in any person who may bring suit and exhibit a perfect chain of deeds without any proof of title, but the claimant must also show by proof sufficient in law for that purpose, that he has in some way acquired the title. *Mitchell v. Garrett*, 397.

The plaintiff's contention that under the Act of 1905, chapter 773, his title was superior to that of the defendant because his deeds were older in date, is not sound. *Mitchell v. Garrett*, 397.

An instruction that the jury should not consider any declarations made by the husband of the *feme* plaintiff unless they find that such declarations were authorized by her, is correct, where the husband had neither then nor at the trial any interest in the land in controversy and is only joined because his wife is plaintiff. *Daugherty v. Taylor*, 446.

The contention that the husband's declarations are competent against him as a *cestui que trust*, in possession, is without merit, where neither the plaintiff nor the defendant derive their

EJECTMENT—*Continued.*

title from him, nor is he setting up any title to himself. *Daugherty v. Taylor*, 446.

A declaration against interest made by a party in possession in disparagement of his title is competent against the defendant who claims under him. *Norcum v. Savage*, 472.

EJECTION. See "Railroads."

ELECTION.

Where a husband and wife owned a tract of land by entireties, and the husband died, leaving a will giving his wife a life estate in said tract and also in two stores and lot, and his entire personal estate valued at $200, and after her death the same property was given to their children, and the wife proved the will and qualified as executrix and took into her possession the personal estate and occupied the land for nine years until her death, such conduct was an election to claim under the will and her administrator, eight years after her death and against the consent of her real representatives, will not be permitted to make an election for her to claim against the will by simply filing a petition for the sale of said tract of land to make assets to pay her debts. *Hoggard v. Jordan*, 610.

ELECTION OF REMEDIES. See "Remedies."

ELECTIONS.

Under section 7, chapter 233, Laws 1903, which provides that "it shall be the duty of the governing body of any city or town, upon the petition of one-third of the registered voters therein, who were registered for the preceding municipal election, to order an election," only those persons are entitled to sign the petition, who, besides being lawfully registered, upon possessing the necessary qualifications, have further paid the poll tax (if liable for poll tax under Act V, section 1, of the Constitution). *Pace v. Raleigh*, 65.

The General Assembly can prescribe such terms as it thinks proper as a prerequisite to ordering an election. *Pace v. Raleigh*, 65.

An order dissolving a restraining order, which had been granted until the hearing, against a tax levied by virtue of an election, authorizing a special school tax will not be reversed where the evidence was conflicting and the judge found as facts that one-fourth of the freeholders of the district signed the petition for the election and that a majority of the voters voted in favor of the special tax, and that while there were some irregularities in holding the election and recording the result, they were

ELECTIONS—*Continued.*

not of such nature as to vitiate the election. *Hyatt v. DeHart*, 270.

Working the roads is a necessary expense and the act authorizing the county commissioners to levy a tax for such purpose without a vote of the people is valid under Article VII, section 7, of the Constitution. *Crocker v. Moore*, 429.

ELECTRIC PLANTS. See "Municipal Corporations."

EMINENT DOMAIN.

When, for the purpose of meeting and providing for a public necessity, the citizen is compelled to sell his property or permit it to be subjected to a temporary or permanent burden, he is entitled by way of compensation, to its actual market value. *Brown v. Power Co.*, 333.

The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted may be considered and not merely the condition it is in at the time and the use to which it is then applied by the owner. *Brown v. Power Co.*, 333.

If a tract of which the whole or a part is taken for a public use, possesses a special value to the owner, which can be measured by money, he is entitled to have that value considered in the estimate of compensation and damages. *Brown v. Power Co.*, 333.

The court properly submitted to the jury the evidence tending to show that plaintiff had water power on the river to be considered as an element of value. *Brown v. Power Co.*, 333.

The condemnation for the purpose of building and operating a railroad did not deprive the plaintiff of the use of her land except to the extent that it was necessary for the operation of the road. For any additional burden she was entitled to compensation to be measured with reference to the limited easement of the railroad. *Brown v. Power Co.*, 333.

An essential and elementary condition precedent annexed to the exercise of the power of eminent domain is that the owner of the property, who is compelled to surrender it, shall have full compensation. *Brown v. Power Co.*, 333.

A deed to the right of way gives a railroad no more rights than it would have acquired by condemnation. *Shepard v. Railroad*, 391.

EMPLOYER AND EMPLOYEE. See "Contracts;" "Master and Servant;" "Railroads;" "Negligence."

ENDORSEMENTS. See "Negotiable Instruments."

ENTIRETIES, TENANTS BY.

In an action brought by the husband alone for damages to land which had been conveyed to the husband and wife and which they held by entireties, the wife was not a necessary party. *West v. Railroad*, 620.

The husband is entitled during coverture to the full control and the usufruct of land held by entireties to the exclusion of the wife. *West v. Railroad*, 620.

ENTRIES AND GRANTS. See "Cherokee Lands."

In an action for trespass commenced in 1902, in which defendants ask to have plaintiff declared trustee of the legal title for them, where plaintiff claims under an entry laid and surveyed in 1859, grant issued in 1867, and registered in 1884, and defendants claim under an entry laid in 1854, surveyed in 1855, entry price paid in 1858, and grant issued and registered in 1896, *held*, that the defendants are barred under section 158 of The Code. *McAden v. Palmer*, 258.

The registration of the plaintiff's grant in 1884 vested the legal title in him and was constructive notice to all the world that he claimed the land as his own. *McAden v. Palmer*, 258.

If the defendants had shown possession of the land, their delay of eighteen years in suing would not have precluded them from seeking the aid of the court in converting the plaintiff into a trustee for their benefit, but as they show no such possession, they have slept on their rights too long. *McAden v. Palmer*, 258.

A status is established between the State and an enterer of the Cherokee Lands by which he becomes a purchaser; the enterer of other lands acquires a mere option to buy. *Frasier v. Gibson*, 272.

To raise a presumption of a grant it is not necessary that the possession adverse to the State should be continuous or unceasing. It is sufficient if it is any possession adverse to the State and shown to exist the length of time prescribed by the statute of limitation. *Bullard v. Hollingsworth*, 634.

EQUITABLE ACTIONS.

Section 158 of The Code covers all causes of action equitable or legal, not otherwise provided for. It bars the assertion of an

EQUITABLE ACTIONS—*Continued.*

equity as well as any other cause of action, unless there are circumstances which take the case out of the statute. *McAden v. Palmer*, 258.

In cases purely equitable in their nature, if an account has been taken and report made, the plaintiff will not be allowed to suffer judgment of nonsuit. *Boyle v. Stallings*, 524.

ESTATES. See "Remainders and Reversions;" "Dower;" "Reservation to a Stranger;" "Entireties, Tenants by."

ESTOPPEL. See "Judgments."

A judgment is an estoppel as to the issues raised by the pleadings, and which could be determined in that action and not only as to those actually named in the judgment. *Bunker v. Bunker*, 18.

This doctrine of estoppel does not extend to any matters which might have been brought into the litigation, or any cause of action which the plaintiff might have joined, but which in fact is neither joined nor embraced by the pleadings. *Bunker v. Bunker*, 18.

In an action for damages for mental anguish alleged to have been suffered by the plaintiff, by the negligent delay in delivering her valise containing her trousseau, whereby her wedding had to be postponed, where it appeared that she had already sued the defendant in an action for non-delivery of her valise and damage to the property, and that the suit was settled, she is precluded by the former settlement, from claiming any damage for mental anguish in this action, if any such right she ever had. *Eller v. Railroad*, 140.

In an action of ejectment, it makes no difference whether the defendant has any title or not, for the plaintiff can succeed only on the strength of his own title as being good against the world or good against the defendant by estoppel. *Bettis v. Avery*, 184.

In order to derive any benefit from a former judgment as a bar to the prosecution of a pending suit, such judgment, even in actions before a justice of the peace, must be specially pleaded and will not be considered under the plea merely denying the indebtedness alleged in the complaint. *Smith v. Lumber Co.*, 375.

A judicial determination of the issues in one action is a bar to a subsequent one between the same parties having substantially the same object in view, although the form of the latter and the precise relief sought is different from the former. *Lumber Co. v. Lumber Co.*, 437.

ESTOPPEL—*Continued.*

While the act of entering upon land and cutting timber constitutes a continuous trespass for which successive actions may be brought, the plaintiff recovering damages in each to the date of his writ, yet this principle does not apply, so as to prevent a bar, where the plaintiff has failed to prove the unlawful entry or to show his possession, either actual or constructive, of the land upon which he alleges the defendant trespassed. *Lumber Co. v. Lumber Co.*, 437.

In an action for damages for trespass committed in cutting timber, where the plaintiff relied alone on constructive possession arising out of its paper title which it alleged covered the land upon which the cutting was done, and where the jury found that the defendant had not trespassed and therefore that the plaintiff had no title to the *locus in quo*, this finding of the jury and the judgment of the court in accordance therewith are a complete bar to a motion in the action by plaintiff for the assessment of damages claimed by him to have accrued from a continuance of the same alleged trespass since the action was commenced, and this is true, though the plaintiff recovered nominal damages by reason of an agreement of counsel admitting a technical trespass. *Lumber Co. v. Lumber Co.*, 437.

In an action to compel specific performance of an option on land, where it appears that the plaintiff was arranging to raise the money within the time required by the option, when he was requested by the defendant that a postponement was desired for a year and the plaintiff agreed to the proposition and within the time fixed by the postponement, went to the defendant and tendered the amount and the same was refused, *held*, the defendant is estopped from pleading the statute of frauds or from denying his obligation and the plaintiff is entitled to specific performance. *Alston v. Connell*, 485.

Where all the facts which go to make out an estoppel are set out in the pleadings, the estoppel is sufficiently pleaded, though it is not claimed as an estoppel in terms. *Alston v. Connell*, 485.

An action by the plaintiff on the notes of the defendant for the purchase price of certain machines, pursued to judgment and uncollected, is not a bar to an action to recover damages for fraud and deceit on the part of the defendant in procuring the sale. *Machine Co. v. Owings*, 503.

The doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other, but the principle does not apply to co-existing and consistent remedies. *Machine Co. v. Owings*, 503.

EVIDENCE. See "Impeachment of Witness."

The declaration of a person deceased, at the time of the trial, in regard to a corner or line in controversy, is competent, provided the declarant had opportunity of knowing, had no interest in making the declaration at the time and that it was *ante litem motam*. *Hill v. Dalton*, 9.

In a processioning proceeding, where the question in controversy was the location of the R Grant, and to do this it was necessary to locate the M grant, evidence to show that the latter was not properly located because it did not correspond with the former, was properly excluded, as the lines of the senior grant, the controlling object, cannot be established by the lines of the junior grant. *Hill v. Dalton*, 9.

In an action against a city for personal injuries, where the evidence tended to show that the plaintiff was injured by falling through a culvert while walking along the streets of the city on a dark night and no lights on the street, that the culvert was considerably worn and covered with dirt, that the top planks were worn, sagged and broken and could be seen through and had been in this condition for several weeks before the plaintiff was hurt, and that she had not noticed this place before, *held*, that there was error in directing a nonsuit. *Fitzgerald v. Concord*, 110.

While the plaintiff was operating a lapper in a cotton mill it became choked and he stopped it with the belt shifter and put his hand into the beater bars to get the cotton out, and the machine, by some unknown means, started and tore his arm off, and there was evidence that the belt shifter was wider than the belt and that a piece of wood had been put on to make it correspond with the width of the belt, *held*, that the plaintiff, upon the doctrine of *res ipsa loquitur*, was entitled to have his case submitted to the jury. *Ross v. Cotton Mills*, 115.

The doctrine of *res ipsa loquitur* does not relieve the plaintiff of the burden of the issue, nor raise any presumption in his favor. The fact of the accident furnishes merely some evidence to go to the jury which requires the defendant "to go forward with his proof." *Ross v. Cotton Mills*, 115.

In an action for damages for personal injuries from a defective machine, it is essential to the plaintiff's recovery that there shall be evidence that the defendant had notice, or could, by reasonable care, have known, of such defect. *Ross v. Cotton Mills*, 115.

In an action to recover lands and for damages for a trespass thereon, where the defendant denied the allegations of the complaint

EVIDENCE—*Continued.*

and alleged mutual mistake as a foundation for correcting the deed, but no issue was submitted by the court or tendered by the defendant upon this equitable defense, it was error to admit evidence of the alleged mistake. ***Mfg. Co. v. Cloer,*** 128.

In an action against a telegraph company for damages for mental anguish where it appears that the defendant delayed for twenty-eight hours to deliver to plaintiff the following telegram: "Come home at once. Your wife is bad off," and that immediately upon its receipt he started home, having been informed of the delay, and on arrival found his wife very ill, that she continued so for eleven weeks, and recovered, *held,* there was some evidence of mental anxiety. ***Hamrick v. Telegraph Co.,*** 151.

It was error to permit the plaintiff to testify as to a conversation about the telegram had with the agent of the defendant at the depot ten or fifteen minutes after the plaintiff received the telegram, which was handed him by his employer. ***Hamrick v. Telegraph Co.,*** 151.

What an agent says while doing acts within the scope of his agency is admissible as a part of the *res gestae.* What he says afterwards concerning his acts is hearsay and inadmissible. ***Hamrick v. Telegraph Co.,*** 151.

The tendering of witnesses by the defendant for the purpose of having their fees taxed as costs does not amount to the introduction of evidence within the meaning of the Superior Court, rule 3, and does not take from the defendant the right to open and conclude the argument. ***Brown v. Railroad,*** 154.

In an action to set aside a verdict for mental incapacity, where it appears that the defendant was a kinsman and neighbor of the grantor and had known her all his life, and that at the time she made the trade with him, she was wild and hardly seemed to know her whereabouts, that he procured the deed away from her home, having taken her away from those who could have advised her and falsely stated that he was going on another matter, that she suddenly changed her mind and was so weak as to be completely subjected to his power and dictation, *held,* this evidence is sufficient to support the finding that the defendant had notice of the grantor's incapacity at the time she made the deed to him, the jury not being bound by his statement that he did not know she was insane. ***Sprinkle v. Wellborn,*** 163.

A presumption of fraud is raised from a transaction with a person *non compos mentis,* without the aid of any evidence of actual

EVIDENCE—*Continued.*

imposition, by the very nature of the transaction. *Sprinkle v. Wellborn*, 163.

Where a motion is made in this court for a new trial for newly discovered evidence, the court never discusses the facts on such motion, but simply awards or refuses a new trial. *Crenshaw v. Street Railway*, 192.

In an action against a railroad for damages for the alleged negligent killing of the plaintiff's intestate at a crossing where there was evidence to show that an engine of the defendant was backing at night toward a crossing near the depot and ran over and killed the intestate, who at the time was lawfully upon the track endeavoring to cross it going to his home; that the engine was running without lights or signal warnings and without any one stationed so as to keep a proper lookout, *held*, that these facts fix the defendant with the legal responsibility for intestate's death. *Dixon v. Railroad*, 201.

Evidence tending to show that the intestate was in a covered wagon and that he drove on the crossing without any stop whatever and with the wagon cover down on the side from which the train approached, and at a point just on the edge of the wagon road and 13 feet from the center of the railroad track one could see down the track from 500 to 1,200 feet, in the direction from which the trains approached, was sufficient for the consideration of the jury on the issue of contributory negligence. *Cooper v. Railroad*, 209.

In an action to recover damages for the alleged negligent killing of plaintiff's intestate, plaintiff's inventory of the personal property of her intestate and her annual account as administratrix are inadmissible for the purpose of showing intestate's capacity to earn and accumulate money. *Cooper v. Railroad*, 209.

Evidence that the plaintiffs held a claim against M, which was sent to the defendant, as their attorney, for collection; that M held claims against L secured by liens on L's property and that the defendant also was L's attorney; that it was agreed between the defendant as plaintiffs' attorney, and M, that if M would release the liens, the defendant would assume the payment of plaintiffs' claim against M, he stating that L, his client, had placed the money in bank to his credit for this purpose, and that the plaintiffs' account was not paid, *held*, that the court erred in deciding as a matter of law that the plaintiffs were not entitled to recover of the defendant the amount of their claim against M. *Millhiser v. Leatherwood*, 231.

EVIDENCE—*Continued.*

Evidence that the plaintiff was permitted to show that a few years ago the defendant maintained a sidetrack at this same spot for two years without any inconvenience or accident, was competent to show the practicability of a sidetrack being established at this point. *Corporation Commission v. Railroad,* 239.

Where the testimony of the plaintiff tended to show that his duties by contract with the defendant railroad caused him to work almost on the track and frequently required him to be upon and across it, and that while so engaged he was run over by an engine of the defendant which had come upon him without any warning, and which warning was required both by the custom and rules of the railroad, and that he had just looked and listened both ways, and the way then appeared clear, *held,* that a nonsuit was erroneous as the question of contributory negligence must be left to the jury to determine under proper instructions. *Sherrill v. Railroad,* 252.

In an action to recover damages for the negligent killing of plaintiff's intestate, where the evidence tends to prove that the intestate was run over by the defendant's train in its yard at night; that he was lying across the track unconscious; that the track was straight for a distance of 100 yards or more; that the headlight of the locomotive was burning; that the train was running slowly and was stopped within 80 feet after striking intestate, and that the engineer or fireman either saw the object lying across the track, or could easily have done so, for a distance of 100 yards or more, *held,* that the judge properly submitted the issues to the jury. *Plemmons v. Railroad,* 286.

On an issue as to the market value of plaintiff's land, where a witness had testified as to the sales of upland lands in the neighborhood before the installation of the water plant, it is not competent to ask him "if the erection of the plant had not increased the value of lands 'down there,'" for the purpose of impeaching him. *Brown v. Power Co.,* 333.

The defendant having introduced plaintiff's telegram, calling for an answer, it was competent to elicit from him whether or not he answered the telegram, without producing the telegram or accounting for its absence, no question being raised as to its terms. *Lipschutz v. Weatherly,* 365.

In an action for damages for negligently failing to store and sell peanuts, where there was evidence from which the jury could have reasonably drawn the conclusion that the defendant had failed in the discharge of his duty to safely store the property, a motion to nonsuit was properly overruled. *Knowles v. Savage,* 372.

EVIDENCE—*Continued.*

Where there is any evidence that reasonably tends to prove the fact in issue, or where the credibility of the witnesses introduced by either party must be passed upon, the question of fact involved is always one for the jury under proper instructions from the court as to the law. *Smith v. Lumber Co.*, 375.

In an action for damages for breach of warranty, where defendant's evidence was material to be considered by the jury upon the issue in regard to damages, a charge, that the jury might consider this evidence in making up their minds as to whether there was a warranty and breach thereof, is reversible error. *Smith v. Newberry*, 385.

An instruction that the jury should not consider any declarations made by the husband of the *feme* plaintiff unless they find that such declarations were authorized by her, is correct, where the husband had neither then nor at the trial any interest in the land in controversy and is only joined because his wife is plaintiff. *Daugherty v. Taylor*, 446.

The contention that the husband's declarations are competent against him as a *cestui que trust*, in possession, is without merit, where neither the plaintiff nor the defendant derive their title from him, nor is he setting up any title to himself. *Daugherty v. Taylor*, 446.

An instruction, on the issue as to damages, that the jury, having determined the decreased earning capacity for a year, must multiply that sum by the expectancy of the plaintiff as fixed by mortuary tables, is erroneous, in that it makes the mortuary tables conclusive as to the plaintiff's expectancy. *Sledge v. Lumber Co.*, 459.

An exception to the admission against the defendant of certain sections in his original answer—he having been allowed to file an amended answer—cannot be sustained. *Norcum v. Savage*, 472.

A declaration against interest made by a party in possession in disparagement of his title is competent against the defendant who claims under him. *Norcum v. Savage*, 472.

Where a live electric wire had broken and fallen down in the street, winding it up in a coil and hanging it up on an electric light pole about five and a half or six feet from the ground, in the portion of a city frequented by many people and permitting it to remain suspended for two days, is evidence of negligence. *Fisher v. New Bern*, 506.

Where the defendant was permitted to prove the custom of the conductor in regard to taking up tickets and checking pas-

EVIDENCE—*Continued.*

sengers from all stations, the testimony of witnesses that this conductor had upon previous occasions called upon each of them for a ticket after it had been surrendered to him, was competent for the purpose of rebutting this custom and showing its fallibility. *Parrott v. Railroad,* 546.

In an action for damages for the negligent burning of plaintiffs' factory, evidence that plaintiffs had a contract to deliver a certain number of crates at a fixed profit; that they had on hand the material to complete this contract at the date of the fire, and that it was impossible to replace this material, was competent to be heard by the jury upon the issue of damages. *Johnson v. Railroad,* 574.

In an action for damages to property alleged to have been burned by the emission of sparks from defendant's engine, it is competent to show that the same engine, shortly before or after the fire in question, emitted sparks. *Johnson v. Railroad,* 581.

Evidence that on the day after the burning of plaintiffs' factory, a car of hulls attached to the engine, which it was alleged set fire to the factory, was seen on fire, is irrelevant as tending to prove the fact in issue—that the engine by the emission of sparks set fire to the factory. *Johnson v. Railroad,* 581.

As a condition precedent to the admissibility of evidence, either direct or circumstantial, the law requires *an open* and *visible* connection between the principal and the evidentiary facts, whether ultimate or subordinate. This does not mean a *necessary* connection, that would exclude all presumptive evidence, but such as is reasonable and not latent or conjectural. *Johnson v. Railroad,* 581.

Where defendant's witness testified to facts tending to show that plaintiffs' factory was not fired by defendant's engine and he was asked on cross-examination, whether or not he had made contradictory statements, which he denied, it was competent to show that he had made such statements, as impeaching but not as substantive evidence. *Johnson v. Railroad,* 581.

Upon the issue, "Is the plaintiff the legitimate child of J and S" (slaves), the question, "Did you ever hear S, after the surrender, say anything about going back to another wife," was properly excluded because it assumes the point in controversy —that S had another wife. *Nelson v. Hunter,* 598.

The court properly excluded the following question: "What did S say then was the purpose he had in his mind at the time he married J, in regard to going back down the country as

EVIDENCE—*Continued.*

soon as he could, to live with his former wife?" as the law does not deal with what a person thinks, but what he does. *Nelson v. Hunter*, 598.

In an action for damages for negligently setting fire to plaintiff's woods by sparks from defendant's engine, evidence that the right-of-way was foul and the discovery of the fire on the right-of-way 30 minutes after defendant's train passed, was sufficient to submit the question to the jury. *Williams v. Railroad*, 623.

To justify the admission of evidence of common reputation on questions of private boundary, the time at which this reputation had its origin should be a comparatively remote period and always *ante litem motam* and should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location. *Bland v. Beasley*, 628.

For the purpose of locating a certain line it was error to permit a witness to testify that he knew the line was the line in question from "what people said," where it appeared that his knowledge grew out of a survey made less than seventeen years before action brought, and the only person he ever heard say so was a person who was alive and a witness in the case. *Bland v. Beasley*, 628.

Evidence of declarations of V. as to the location of an oak, a marked corner, tending to prove that the oak was a corner of the tract called the Jones land claimed by the defendants, was competent, it appearing that V. was dead, disinterested and that the declarations were made *ante litem motam*. *Bullard v. Hollingsworth*, 634.

In an action on a draft by the plaintiff claiming to be a holder in due course, it was error to exclude evidence of the defendant tending to show that the draft had been seen at a bank unendorsed and after maturity. *Mayers v. McRimmon*, 640.

EXECUTIONS.

Under section 370 of The Code, the sheriff, upon receiving an execution, is directed to sell the property previously attached by him and is invested with as much power and authority to act in the premises as if an execution, in the form of a *venditioni exponas*, had been issued to him, specially commanding him to sell the particular property. *May v. Getty*, 310.

Where there was execution against a life tenant in 1869 and sale thereunder and a subsequent conveyance back by the pur-

EXECUTIONS—*Continued.*

chaser to him, the seven years' statute of adverse possession would not begin to run against the remaindermen, till his death. *Norcum v. Savage*, 472.

EXCEPTIONS AND OBJECTIONS. See "Appeal and Error;" "Harmless Error."

An exception that the court failed to explain to the jury the doctrine of *res ipsa loquitur* cannot be sustained, where the appellant failed to hand up a prayer for instruction to that effect. *Lyles v. Carbonating Co.*, 25.

Where it does not appear what the appellant proposed to show by the rejected questions, this court cannot pass upon the exceptions to the trial judge's rulings. *Ross v. Cotton Mills*, 115.

Where evidence was introduced for the consideration of the court alone and this was fully explained to the jury, the fact that counsel commented upon it, cannot be made the ground for exception now, where no objection was made at the time. *Sprinkle v. Wellborn*, 163.

If a party considers himself aggrieved by the rulings of the judge, on exceptions to the report of a referee, he should point out his objections by exceptions duly noted, and where the plaintiff filed a large number of exceptions to the referee's report and the judge confirms or modifies certain portions of the report and sets aside others, an exception, "the plaintiff excepts to such rulings adverse to it and appeals," is too general to be considered. *Commissioners v. Erwin*, 193.

The general rule is, that in the absence of a request by the complaining party, an exception will not lie to the failure to submit issues. *Smith v. Newberry*, 385.

Where an objection for defect of parties was made below and overruled, this court will not exercise its discretionary power of amendment to destroy an exception duly taken below. *West v. Railroad*, 620.

EXECUTORS AND ADMINISTRATORS.

A surety company which has been called upon to pay a *devastavit* committed by its principal, an administrator, is entitled to be subrogated to the rights of the creditor against a party who received the money with knowledge of its wrongful appropriation and his rights are exactly those of the creditor. *Caviness v. Fidelity Co.*, 58.

Where an administrator is also a distributee, he is entitled to pay the other distributees and to retain himself, at any time dur-

EXECUTORS AND ADMINISTRATORS—*Continued.*

ing the administration, the amount to which each is entitled. if he pays more or retains more than is due, he is liable personally and on his bond for the excess. *Caviness v. Fidelity Co.*, 58.

While an administrator is allowed by statute two years within which to settle the estate, he should, when there are no debts or other exigiencies requiring the retention of the funds, pay them to the distributees and they may within the two years maintain an action for them. *Caviness v. Fidelity Co.*, 58.

Where an administrator committed a *devastavit* in February, a party who received the money with knowledge of its wrongful appropriation, can be compelled to answer to the extent of the *devastavit*, but he is not liable for any *devastavit* thereafter on the part of the administrator of which he had no knowledge. *Caviness v. Fidelity Co.*, 58.

In an action by an administratrix to recover damages for the alleged negligent killing of plaintiff's intestate, a motion to dismiss the action because the administratrix had not given an administration bond at the time the letters of administration were issued, was properly overruled, as the issuing of the letters cannot be collaterally attached in this action. *Plemmons v. Railroad*, 286.

Where the judge found, upon abundant evidence, that the sum bid at a sale of land for assets by an executor, was inadequate, there was no error in refusing to confirm the sale. *Harrell v. Blythe*, 415.

The land of a decedent, against whose executor a judgment has been obtained, cannot be sold through a commissioner by an order in the cause, even though the land may be subject to the lien of an attachment levied upon it during the decedent's life time. *Atkinson v. Ricks*, 418.

Where a cause of action for damages to land accrued in the lifetime of the testator or intestate, or in other words, the injury was committed during that time, it survives to his executor or administrator; if it was committed after his death, the right of action would belong to the heir or devisee. *Mast v. Sapp*, 533.

EXEMPTIONS.

Where the work done on a house and furnishing the material were all in the same contract, which was entire and indivisible, the contractor is entitled to a lien for the whole amount under the "mechanic's and laborer's lien law," and the judgment is superior to the homestead and personal property exemption. *Isler v. Dixon*, 529.

EXPECTANCY. See "Mortuary Tables."

EXPULSION. See "Railroads."

EXTENSION OF TIME. See "Specific Performance."

FALSE REPRESENTATIONS. See "Fraud."

FELLOW SERVANT ACT.

The contention that the Fellow Servant Act (Rev., sec. 2646,) applies to the defendant, Frank Hitch Lumber Co., cannot be determined where its answer denied that it owned or operated the logging railroad and no appropriate issues were submitted. *Tanner v. Lumber Co.*, 475.

FINDINGS OF FACT.

While in injunction cases, the findings of fact by the judge below are not conclusive on appeal, still there is a presumption that the judgment and proceedings below are correct and the burden is upon the appellant to assign and show error. *Hyatt v. DeHart*, 270.

Where there was evidence to sustain the findings of fact as to the rescission and abandonment of a contract, the findings will not be reviewed by this court. *May v. Getty*, 310.

This court has no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them. *Boyle v. Stallings*, 524.

FIRES. See "Railroads."

FLAG STATIONS. See "Railroads."

FORFEITURES. See "Cherokee Lands."

Forfeitures are not favored by the law and when incurred can only be enforced in the manner pointed out in the contract to enforce them. *Frasier v. Gibson*, 272.

FRAUD. See "Statute of Frauds;" "Insurance;" "Deeds;" "Bankruptcy."

When the plaintiff sues to recover his share arising from a sale of certain options on land, which the plaintiff took in the name of the defendant under an agreement that the defendant was to advance the incidental expenses, sell the options and divide the profits equally, it was error to discharge an order of arrest of the defendant allowed upon proof of fraud on his part in connection with the sale of the options. *Ledford v. Emerson*, 288.

FRAUD—*Continued.*

In an action by plaintiff to recover on notes given in part payment of the purchase of a saw mill plant and certain standing timber, where the evidence on the part of the defendants tended to show that at the time of the trade, and as an inducement thereto, the plaintiff stated that there were three million feet of merchantable timber ascertained by two careful estimates; that the machinery was practically new, having been in use only six months and was in good condition; that as a matter of fact there was only about one million feet of timber, and this was well known to the plaintiff at the time, having been ascertained by him by estimates previously made, and was unknown to the defendants, who relied upon the positive assurance and statements of the plaintiff as to the quantity of timber; that the machinery was old, and that the boilers were worn out when brought there the year before, *held*, that the court below erred in dismissing the defendants' counterclaim for damages for fraud. *May v. Loomis*, 350.

The principle, that false representations as to material facts knowingly and wilfully made as an inducement to the contract and by which the same was effected, reasonably relied upon by the other party and causing pecuniary damage and constituting an actionable wrong, applies to contracts and sales of both real and personal property. *May v. Loomis*, 350.

Where the parties were not at arm's length with reference to false representations and did not have equal opportunity of informing themselves, the buyers' claim for relief for fraud is not barred on the ground that they were negligent. *May v. Loomis*, 350.

In no case can a person escape responsibility for representations on the ground that the other party was negligent in relying on them, if, in addition to making the representations, he resorted to artifice which was reasonably calculated to induce the other party to forego making inquiry. *May v. Loomis*, 350.

Where the plaintiff, knowing that the only one of the defendants whose experience qualified him to make an examination of the property with any intelligence, was physically unable to do so, assured the defendants that he had caused the timber to be carefully estimated and that such estimates showed there were three million feet of hard wood timber, whereas, in fact the knowledge furnished to the plaintiff by these estimates showed only one million feet on the same, *held*, that these represen-

FRAUD—*Continued.*

tations were not mere matters of opinion, but purported to be statements of fact and were so intended and accepted by the parties. *May v. Loomis,* 350.

Where a sale has been effected by an actionable fraud, the purchaser has an election of remedies. He may ordinarily, at least at the outset, rescind the trade, in which case he can recover the purchase price or any portion of it that he may have paid, or avail himself of the facts as a defense in bar of recovery of the purchase price or any part of it which remains unpaid, or he may hold the other party to the contract and sue him to recover the damages he has sustained in consequence of the fraud. *May v. Loomis,* 350.

In order to rescind, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm in part; he must do one or the other. *May v. Loomis,* 350.

As a general rule, a party is not allowed to rescind where he is not in a position to put the other *in statu quo* by restoring the consideration passed; or, if after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end. *May v. Loomis,* 350.

Where the defendants have made payments in recognition of the contract and have continued to manufacture and sell the lumber after knowledge of the fraud and are not in a position to restore the consideration, they cannot rescind the trade and plead fraud in bar of recovery on the notes, but they can set up the fraud by way of counterclaim and recover for the damages suffered. *May v. Loomis,* 350.

While an action for breach of warranty arises out of contract and deceit is for a tort, yet when they both arise out of the same transaction they may be joined. *Smith v. Newberry,* 385.

An action by the plaintiff on the notes of the defendant for the purchase price of certain machines, pursued to judgment and uncollected, is not a bar to an action to recover damages for fraud and deceit on the part of the defendant in procuring the sale. *Machine Co. v. Owings,* 503.

Where the parties made a contract for the sale of certain timber, reserving a well defined class of trees, and defendant undertook to reduce the contract to writing, in accordance with its terms, but knowingly included the reserved timber and falsely

FRAUD—*Continued.*

represented to plaintiff that said timber was reserved in the deed, and by means of this false representation, procured the execution of the deed, the plaintiff has a cause of action for deceit, and this is not dependent upon the removal of the timber. *Griffin v. Lumber Co.*, 514.

Where a party signs the paper-writing which he intended, but is induced to do so by means of some false representation, this is fraud in the representation or treaty, and not in the *factum*. *Griffin v. Lumber Co.*, 514.

Before signing a deed the grantor should read it, or, if unable to do so, should require it to be read to him and his failure to do so, in the absence of any fraud or false representation as to its contents, is negligence, for the result of which the law affords no redress, but when fraud or any device is resorted to by the grantee which prevents the reading, or having read, the deed, the rule is different. *Griffin v. Lumber Co.*, 514.

One who chooses to make positive assertions without warrant, shall not excuse himself by saying that the other party need not have relied upon him. He must show that his representation was not in fact relied upon. *Griffin v. Lumber Co.*, 514.

In an action for deceit in falsely securing the execution of a deed, conveying timber which was reserved, where the defendant requested the court to instruct the jury that the extent of his liability was the "market" value of the timber at the date of the deed, there was no error committed in giving the instruction with the word "market" stricken out, the court saying, that while the market value should be considered as evidence of its value, it should not control—the question was what was its real value. *Griffin v. Lumber Co.*, 514.

In the case of an insane person, one wholly incompetent to contract, the law presumes fraud from the condition of the parties, the presumption being stronger or weaker, according to the position or condition of the parties with respect to each other. *Sprinkle v. Wellborn*, 163.

A presumption of fraud is raised from a transaction with a person *non compos mentis*, without the aid of any evidence of actual imposition, by the very nature of the transaction. *Sprinkle v. Wellborn*, 163.

In an action to set aside a deed for mental incapacity and for fraud, the finding of the jury that the grantor did not have sufficient mental capacity and that the grantee had notice of this fact, is sufficient to invest the court with the power and to induce it to set aside the deed, if no real injustice is done

FRAUD—*Continued.*

to the grantee and no superior equity has intervened in favor of a third party, the granting of the relief resting in the sound discretion of the court. *Sprinkle v. Wellborn*, 163.

The remedy of a vendor is not defeated where the fraudulent vendee has sold the property to an innocent purchaser, for in such case the proceeds of the sale are as available as the property itself. The fraudulent vendee becomes chargeable with the proceeds received from the innocent purchaser, but the property itself is not, and a personal judgment may be obtained against him. *Sprinkle v. Wellborn*, 163.

GRADED SCHOOLS. See "Schools."

GRANTS. See "Deeds;" "Entries and Grants;" "Processioning."

HARMLESS ERROR.

Where an issue has been eliminated from the case by the verdict upon other issues, any error committed as to instructions relating to such issue was harmless. *Sprinkle v. Wellborn*, 163.

The court had the power to set aside the verdict of the jury, but it had no power to reverse the answer of the jury. As the judgment is not affected by this action, it is not reversible error, and the case is left as if that issue had not been submitted. *Sprinkle v. Wellborn*, 163.

Where His Honor, after the jury retired, learned that he had been misled as to the form of the defendant's alleged contract, his conduct in calling them back and removing any impression made on their mind by reason of such misapprehension was not prejudicial to the defendant. *Buggy Co. v. Dukes*, 394.

Where it is clear that the plaintiff's cause of action is barred by the statute of limitations, which is properly pleaded, an error as to permanent damage, if any was committed, is harmless and the judgment of nonsuit will not be disturbed. *Cherry v. Canal Co.*, 422.

In order to constitute reversible error, it must appear that the appellant's rights have in some way been prejudiced by the action of the court below. *Hosiery Co. v. Cotton Mills*, 452.

Where the evidence, admitted over appellant's objection and afterwards withdrawn from the jury, was so compact and brief and the language of the judge so clear in withdrawing it, that this court is satisfied the jury could not have been misled or unduly influenced against appellant by it, a new trial will not be ordered. *Parrott v. Railroad*, 546.

HARMLESS ERROR—*Continued.*

In an action for indemnity on an accident policy, where the jury found that the defendant knew of the mental and physical condition of the plaintiff at the time the policy was issued, a judgment in favor of the plaintiff will not be disturbed for an error in the charge on the issue as to the warranty. *Fishblate v. Fidelity Co.*, 589.

HEIRS. See "Death."

HERTFORD COUNTY ACT. See "Ejectment."

HIGHWAYS. See "Roads."

HOLDER IN DUE COURSE. See "Negotiable Instruments."

HOMESTEAD. See "Exemptions."

HUSBAND AND WIFE. See "Married Women, Contracts of;" "Dower."

An instruction that the jury should not consider any declarations made by the husband of the *feme* plaintiff unless they find that such declarations were authorized by her, is correct, where the husband had neither then nor at the trial any interest in the land in controversy and is only joined because his wife is plaintiff. *Daugherty v. Taylor*, 446.

Where a deed to the wife, who bought and paid for the land, was stolen or lost without registration, and after her death her husband procured another deed to be executed to himself, the husband held the land, by implication of law, as trustee for their children, subject to his life estate as tenant by the curtesy. *Norcum v. Savage*, 472.

The husband is entitled during coverture to the full control and the usufruct of land held by entireties to the exclusion of the wife. *West v. Railroad*, 620.

ILLEGITIMATES. See "Descent and Distribution."

"IMMEDIATELY." See "Reasonable Time."

IMPEACHMENT OF WITNESS.

On an issue as to the market value of plaintiff's land, where a witness had testified as to the sales of upland lands in the neighborhood before the installation of the water plant, it is not competent to ask him "if the erection of the plant had not increased the value of lands 'down there,'" for the purpose of impeaching him. *Brown v. Power Co.*, 333.

Where defendant's witness testified to facts tending to show that plaintiffs' factory was not fired by defendant's engine and he

IMPEACHMENT OF WITNESS—*Continued.*

was asked on cross-examination, whether or not he had made contradictory statements, which he denied, it was competent to show that he had made such statements, as impeaching but not as substantive evidence. *Johnson v. Railroad*, 581.

Where the defendant was permitted to prove the custom of the conductor in regard to taking up tickets and checking passengers from all stations, the testimony of witnesses that this conductor had on previous occasions called upon each of them for a ticket after it had been surrendered to him, was competent for the purpose of rebutting this custom and showing its fallibility. *Parrott v. Railroad*, 546.

IMPLIED TRUSTS. See "Trusts and Trustees."

INADEQUACY OF PRICE. See "Judicial Sales."

INDUSTRIAL SIDINGS. See "Sidetracks."

INJUNCTIONS.

An order dissolving a restraining order, which had been granted until the hearing, against a tax lexied by virtue of an election, authorizing a special school tax will not be reversed where the evidence was conflicting and the judge found as facts that one-fourth of the freeholders of the district signed the petition for the election and that a majority of the voters voted in favor of the special tax, and that while there were some irregularities in holding the election and recording the result, they were not of such nature as to vitiate the election. *Hyatt v. DeHart*, 270.

While in injunction cases, the findings of fact by the judge below are not conclusive on appeal, still there is a presumption that the judgment and proceedings below are correct and the burden is upon the appellant to assign and show error. *Hyatt v. DeHart*, 270.

The general rule is that when the injunctive relief sought is not merely ancillary to the principal relief demanded in the action, but is itself the main relief, the court will not dissolve the injunction, but will continue it to the hearing. *Hyatt v. DeHart*, 270.

When, however, the injunction is against the prosecution of enterprises which tend to develop the resources of the country, an injunction to the hearing will ordinarily be refused. *Hyatt v. DeHart*, 270.

INNOCENT PURCHASERS. See "Deeds."

INSTRUCTIONS.

An exception that the court failed to explain fully to the jury the doctrine of *res ipsa loquitur* cannot be sustained, where the appellant failed to hand up a prayer for instruction to that effect. *Lyles v. Carbonating Co.*, 25.

A judge is not obliged to repeat instructions already given, even when especially asked to do so in a prayer. *Sprinkle v. Wellborn*, 163.

Where an issue has been eliminated from the case by the verdict upon other issues, any error committed as to instructions relating to such issue was harmless. *Sprinkle v. Wellborn*, 163.

In an action for damages for the alleged negligent killing of plaintiff's estate, an instruction that relieved the traveler of all obligation to look and listen when there had been a failure on the part of the defendant to give the ordinary signals, where there was evidence tending to show that there was an unobstructed view, is erroneous, and the fact that the court in other portions of the charge imposed on the plaintiff the obligation to look and listen whenever the view was unobstructed, does not help the matter. *Cooper v. Railroad*, 209.

The court is not required to give an instruction in the language of the prayer, but it is sufficient if the instruction given covers the principle involved. *Brown v. Power Co.*, 333.

In an action to vacate a deed on the ground of mental incapacity, there was no error in refusing plaintiff's prayer that "it requires more mental capacity to execute a deed than a will, and while it is sufficient proof to show that a person knows the nature of the property he undertakes to will away and to whom he wills it, that amount of mental capacity alone will not be sufficient in a person undertaking to execute a deed." *Bond v. Manufacturing Co.*, 381.

In an action for damages for breach of warranty, where defendant's evidence was material to be considered by the jury upon the issue in regard to damages, a charge, that the jury might consider this evidence in making up their minds as to whether there was a warranty and breach thereof, is reversible error. *Smith v. Newberry*, 385.

Where His Honor, after the jury retired, learned that he had been misled as to the form of the defendant's alleged contract, his conduct in calling them back and removing any impression made on their mind by reason of such misapprehension was not prejudicial to the defendant. *Buggy Co. v. Dukes*, 394.

If a party desires fuller or more specific instructions than those given in the general charge, he must ask for them and not

INSTRUCTIONS—*Continued.*

wait until the verdict has gone against him and then, for the first time, complain of the charge. *Simmons v. Davenport*, 407.

In an action for personal injuries, an instruction on the issue as to contributory negligence that "if the plaintiff was asleep and was thrown off the car by a sudden jerk caused by the negligence of the engineer or by pulling out the slack, and that said slack was the result of having no brakes on the cars, then the jury should answer the issue 'no,'" is erroneous, for if the negligence of the plaintiff in going to sleep on a moving train concurred with the defendant's negligence as to the proximate cause of the injury, this would be contributory negligence. *Sledge v. Lumber Co.*, 459.

Where the court instructed the jury that the burden was upon the plaintiff to show the alleged fraud by testimony clear, cogent and convincing, and in concluding the charge, said: "The burden of all the issues is on the plaintiff and the jury cannot find any one in their favor unless upon the greater weight of the testimony," the last remark, considered in the light of the charge given in the beginning, could not have misled the jury. *Griffin v. Lumber Co.*, 514.

In an action for indemnity on an accident policy where, on an issue involving the question as to whether the plaintiff, in representing himself to be sound physically and mentally, made a false statement on a matter material to the contract, a charge that a misrepresentation to become material, must be as to a defect which contributes in some way to the loss for which indemnity is claimed, is erroneous. *Fishblate v. Fidelity Co.*, 589.

A prayer to instruct the jury that from thirty years' adverse possession against the State all that is necessary to show a complete title out of the State is presumed, was correctly modified by adding after the word "possession" the following words: "Such possession having been ascertained and identified under known and visible lines or boundaries." Revisal, section 380. *Bullard v. Hollingsworth*, 634.

INSURANCE.

In an action to recover premiums paid on a life policy, a demurrer to the evidence was properly overruled when it appeared that the plaintiff, an illiterate colored woman, was induced to take a policy upon the false representation of defendant's agent that she could draw out and get the amount due her at the end of ten years. *Caldwell v. Insurance Co.*, 100.

INSURANCE—*Continued.*

The instruction that "if you find that there was fraud in the transaction and that afterwards the plaintiff ascertained that the policies were not what she contracted for with the agent, and that after this she went on and paid the premiums and kept her life and the lives of the others insured and took the benefit, then she could not raise this question of fraud, although there may have been fraud in the beginning, unless you further find that the defendant's collecting agent and local superintendent lulled her into security and led her to believe that she would get the face of the policies at the end of ten years, or unless she paid the premiums under protest," is supported by the evidence. *Caldwell v. Insurance Co.*, 100.

In an action to recover insurance premiums, where the verdict establishes the fact that the insurance was obtained by the false representation of defendant's agent, the measure of relief is the amount paid with interest. *Caldwell v. Insurance Co.*, 100.

Where in the main body of an insurance policy there is a definite stipulation of indemnity in case of disability arising from certain specified diseases, blood poisoning being one expressly named, various provisos entirely withdrawing blood poisoning from the operations of the policy cannot avail to defeat the plaintiff's recovery for the indemnity for disability arising from said disease. *Jones v. Casualty Co.*, 262.

In the construction of insurance policies, all doubt or uncertainty as to the meaning of the contract, shall be resolved in favor of the insured. *Jones v. Casualty Co.*, 262.

While clauses in a contract apparently repugnant must be reconciled if it can be done by any reasonable construction, yet, a proviso which is utterly repugnant to the body of the contract and irreconcilable with it, will be rejected. *Jones v. Casualty Co.*, 262.

A subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract, will be set aside. *Jones v. Casualty Co.*, 262.

In an action for indemnity on an accident policy where, on an issue involving the question as to whether the plaintiff, in representing himself to be sound physically and mentally, made a false statement on a matter material to the contract, a charge that a misrepresentation to become material, must be as to a defect which contributes in some way to the loss for which indemnity is claimed, is erroneous. *Fishblate v. Fidelity Co.*, 589.

INSURANCE—*Continued.*

Every fact untruly asserted or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premiums. ***Fishblate v. Fidelity Co.***, 589.

In an action for indemnity on an accident policy, where the jury found that the defendant knew of the mental and physical condition of the plaintiff at the time the policy was issued, a judgment in favor of the plaintiff will not be disturbed for an error in the charge on the issue as to the warranty. ***Fishblate v. Fidelity Co.***, 589.

In an action for indemnity on an accident policy where the answer set up a breach of warranty by way of defense, a reply was not required, and the court properly submitted an issue as to whether the defendant had knowledge of the mental and physical condition of the plaintiff at the time the policy was issued. ***Fishblate v. Fidelity Co.***, 589.

Where the local agent of an insurance company has actual knowledge of the falsity of a statement made by the insured in his application, and forwards the application upon which the policy is issued, the knowledge of the agent is the knowledge of the company, and the false statement will not avoid the contract, in the absence of any evidence of actual fraud on the part of the applicant and the agent. ***Fishblate v. Fidelity Co.***, 589.

The clause in an accident policy that "no notice or knowledge of the agent or any other person shall be held to effect a waiver or change in this contract or any part of it," is ineffective for the purpose designed. ***Fishblate v. Fidelity Co.***, 589.

INVENTORY. See "Evidence."

ISSUES. See "Practice."

Issues arise upon the pleadings and not upon evidential facts. All that is requisite is that the court shall submit issues in such form as, when answered either way, may be the basis for its judgment. ***Wright v. Cotten***, 1.

It is not material in what form issues are submitted to the jury, provided they are germane and each party has a fair opportunity to present his version of the facts and his view of the law so that the case can be tried on the merits. ***Wilson v. Cotton Mills***, 52.

ISSUES—*Continued.*

The issue, "Did the defendant maliciously or wilfully, wantonly and rudely mistreat and humiliate the plaintiff while a passenger on its train?" is a pure issue of fact, and the finding of the jury is conclusive, the judge having refused to set the verdict aside. *Hutchinson v. Railroad,* 123.

In an action to recover lands and for damages for a trespass thereon, where the defendant denied the allegations of the complaint and alleged mutual mistake as a foundation for correcting the deed, but no issue was submitted by the court or tendered by the defendant upon this equitable defense, it was error to admit evidence of the alleged mistake. *Manufacturing Co. v. Cloer,* 128.

If the defendant relied upon the equitable matter set out in the answer, it was his duty to tender appropriate issues upon which the facts set out could be found. *Manufacturing Co. v. Cloer,* 128.

An issue should be directed to the matter alleged on the one side and denied on the other. The judge may, in addition to the issue, submit questions to the jury pertinent to the matters in controversy, but he is not compelled to do so and his refusal is not reviewable. *Crawford v. Masters,* 205.

Where two causes of action were set forth in a warrant before a justice of the peace (treated as a complaint), the judge properly submitted the issue upon the cause of action which was sustained by the evidence. *Smith v. Newberry,* 385.

The general rule is, that in the absence of a request by the complaining party, an exception will not lie to the failure to submit issues. *Smith v. Newberry,* 385.

In an action for indemnity on an accident policy where the answer set up a breach of warranty by way of defense, a reply was not required, and the court properly submitted an issue as to whether the defendant had knowledge of the mental and physical condition of the plaintiff at the time the policy was issued. *Fishblate v. Fidelity Co.,* 589.

In an action on a note given for the purchase price of a horse, where defendant admitted the execution of the note and by way of counterclaim alleged a warranty and breach thereof, and at the close of the evidence, the court intimated that it would charge the jury that there was no evidence of warranty, defendant was relieved of the duty of tendering an issue upon that question. *Beasley v. Surles,* 605.

Revisal, section 548, contemplates that the issues shall be drawn before the introduction of testimony. *Beasley v. Surles,* 605.

ITEMIZED ACCOUNTS.

In an action to recover for goods sold and delivered, where a verified statement of the account shows that it is for goods sold by the plaintiff to the defendant and sets out the number and kind of articles, the catalogue numbers, price per dozen and discounts allowed, and there are trade terms and abbreviations well understood in the trade, which show more fully the kind of articles, it is properly itemized to make out a *prima facie* case under Revisal, section 1625. *Claus v. Lee*, 552.

JOINDER OF CAUSES OF ACTION. See "Pleadings."

JUDGMENTS. See "Estoppel."

A judgment is an estoppel as to the issues raised by the pleadings, and which could be determined in that action and not only as to those atcually named in the judgment. *Bunker v. Bunker*, 18.

A judgment is final which decides the case upon its merits, without any reservation for other and future directions of the court, so that it is not necessary to bring the case again before the court. *Bunker v. Bunker*, 18.

Where a final judgment was rendered and no exception was entered and no appeal taken, but the amount recovered and the costs were paid, the vitality of that suit and the judgment therein was fully spent and the latter cannot be re-opened and the suit revived by any sort of proceeding known to the law. *Bunker v. Bunker*, 18.

In an action for damages for mental anguish alleged to have been suffered by the plaintiff, by the negligent delay in delivering her valise containing her trousseau, whereby her wedding had to be postponed, where it appeared that she had already sued the defendant in an action for non-delivery of her valise and damage to the property, and that the suit was settled, she is precluded by the former settlement, from claiming any damage for mental anguish in this action, if any right she ever had. *Eller v. Railroad*, 140.

In an action for the recovery of land the judgment must follow and conform to the verdict in designating the extent of the recovery, and must be rendered for the premises described in the complaint. *Crawford v. Masters*, 205.

A plaintiff cannot take a general and personal judgment against a defendant, who is a non-resident, upon a service by publication and not even when an attachment has been levied on his property, the court having jurisdiction to adjudge against him only to the extent of the property seized. *May v. Getty*, 310.

JUDGMENTS—*Continued.*

The judgment in another suit is conclusive as to the validity of the cause of action in a collateral proceeding, except for want of jurisdiction. *May v. Getty*, 310.

An agreement empowering the judge to sign judgment "out of term," gave him no power after the adjournment of the term to hear and pass upon a motion to set the verdict aside. *Knowles v. Savage*, 372.

In order to derive any benefit from a former judgment as a bar to the prosecution of a pending suit, such judgment, even in actions before a justice of the peace, must be specially pleaded and will not be considered under the plea merely denying the indebtedness alleged in the complaint. *Smith v. Lumber Co.*, 375.

The land of a decedent, against whose executor a judgment has been obtained, cannot be sold through a commissioner by an order in the cause, even though the land may be subject to the lien of an attachment levied upon it during the decedent's life time. *Atkinson v. Ricks*, 418.

A judicial determination of the issues in one action is a bar to a subsequent one between the same parties having substantially the same object in view, although the form of the latter and the precise relief sought is different from the former. *Lumber Co. v. Lumber Co.*, 437.

Judgments rendered by a justice of the peace, entitled "McAfee Estate by Cora McAfee, Agent, against W. A. Gregg and Wife, Addie," and docketed in the Superior Court, are not void either because of the alleged defect as to parties plaintiff or because it appears in the summons that the defendant Addie was then married, and it was error to dismiss supplemental proceedings brought to enforce their payment. *McAfee v. Gregg*, 448.

To render the judgment of the justice of the peace void, it must appear on the record, not only that the defendant is at that time a married woman, but it must also appear on the face of the proceedings, in that court, that the cause of action as to her is one over which that court has no jurisdiction. *McAfee v. Gregg*, 448.

Where the solvent sureties paid the amount due on a judgment against the principal and the sureties and caused the same to be assigned for their benefit, and the plaintiff was designated as agent to collect what he could from the insolvent sureties, and as such agent held the balance due on the judgment and in pursuance of this arrangement, took from the defendant,

JUDGMENTS—*Continued.*

an insolvent surety, a note and mortgage which was to be in full payment of his liability on said judgment, *held*, that a judgment for the full amount of the note was proper, the *pro rata* due from the defendant being more than the amount of the note. *Chadbourn v. Durham*, 501.

An action by the plaintiff on the notes of the defendant for the purchase price of certain machines, pursued to judgment and uncollected, is not a bar to an action to recover damages for fraud and deceit on the part of the defendant in procuring the sale. *Machine Co. v. Owings*, 503.

Where the work done on a house and furnishing the material were all in the same contract, which was entire and indivisible, the contractor is entitled to a lien for the whole amount under the "mechanic's and laborer's lien law," and the judgment is superior to the homestead and personal property exemption. *Isler v. Dixon*, 529.

Where a judgment has been rendered by a justice of the peace in the absence of either party, in order to give the justice jurisdiction under Revisal, section 1478, to open and rehear the the case, the party against whom the judgment was given must make his application by affidavit within ten days after rendition of the judgment. *Bullard v. Edwards*, 644.

JUDICIAL SALES.

Although the summons in a special proceeding is not in the record, yet where it sufficiently appears in the affidavit and order for publication that a summons was issued and that a return was made thereon that the defendants could not be found "after due search;" that the defendants are non-residents and have an interest in the property, etc., and the notice of publication is in the record and is full and explicit, and where it appears the land was sold for partition, the purchase money paid, the sale confirmed and deed made in due form, *held*, there are no defects sufficient to avoid the sale. *Rose v. Davis*, 266.

Where the judge found, upon abundant evidence, that the sum bid at a sale of land for assets by an executor, was inadequate, there was no error in refusing to confirm the sale. *Harrell v. Blythe*, 415.

Judicial sales are only conditional and are not complete until they have been reported to and confirmed by the court; and the bid may be rejected and the sale set aside, if, in the exercise of its sound discretion, the court should think proper to do so. *Harrell v. Blythe*, 415.

JUDICIAL SALES—*Continued.*

The land of a decedent, against whose executor a judgment has been obtained, cannot be sold through a commissioner by an order in the cause, even though the land may be subject to the lien of an attachment levied upon it during the decedent's life time. *Atkinson v. Ricks*, 418.

JURISDICTION.

Judgments rendered by a justice of the peace, entitled "McAfee Estate by Cora McAfee, Agent, against W. A. Gregg and Wife, Addie," and docketed in the Superior Court, are not void either because of the alleged defect as to parties plaintiff or because it appears in the summons that the defendant Addie was then married, and it was error to dismiss supplemental proceedings brought to enforce their payment. *McAfee v. Gregg*, 448.

To render the judgment of the justice of the peace void, it must appear on the record, not only that the defendant is at that time a married woman, but it must also appear on the face of the proceedings, in that court, that the cause of action as to her is one over which the court has no jurisdiction. *McAfee v. Gregg*, 448.

A plaintiff cannot take a general and personal judgment against a defendant, who is a non-resident, upon a service by publication and not even when an attachment has been leived on his property, the court having jurisdiction to adjudge against him only to the extent of the property seized. *May v. Getty*, 310.

JUSTICES OF THE PEACE.

When the parties come to trial in a justice's court, the justice should require the plaintiff to state "in a plain and direct manner the facts constituting the cause of action" and a denial by defendant or other facts constituting a defense. *Smith v. Newberry*, 385.

Where two causes of action were set forth in a warrant before a justice of the peace (treated as a complaint), the judge properly submitted the issue upon the cause of action which was sustained by the evidence. *Smith v. Newberry*, 385.

Judgments rendered by a justice of the peace, entitled "McAfee Estate by Cora McAfee, Agent, against W. A. Gregg and Wife, Addie," and docketed in the Superior Court, are not void either because of the alleged defect as to parties plaintiff or because it appears in the summons that the defendant Addie was then married, and it was error to dismiss supplemental proceedings brought to enforce their payment. *McAfee v. Gregg*, 448.

JUSTICES OF THE PEACE—*Continued.*

To render the judgment of the justice of the peace void, it must appear on the record, not only that the defendant is at that time a married woman, but it must also appear on the face of the proceedings, in that court, that the cause of action as to her is one over which that court has no jurisdiction. *McAfee v. Gregg*, 448.

Where a judgment has been rendered by a justice of the peace in the absence of either party, in order to give the justice jurisdiction under Revisal, section 1478, to open and rehear the case, the party against whom the judgment was given must make his application by affidavit within ten days after rendition of the judgment. *Bullard v. Edwards*, 644.

KNOWLEDGE OF AGENT. See "Insurance;" "Principal and Agent."

LACHES. See "Trusts and Trustees."

LEGISLATURE. See "Acts;" "Statutes;" "Code, The;" "Revisal;" "Constitutional Law."

The General Assembly can prescribe such terms as it thinks proper as a prerequisite to ordering an election. *Pace v. Raleigh*, 65.

The office of register of deeds is constitutional, but the duties are statutory, and the Legislature may, within reasonable limits, change the duties and diminish the emoluments of the office, if the public welfare requires it to be done. *Fortune v. Commissioners*, 322.

The power of the General Assembly over dispensaries in their creation, abolition and the application of their net proceeds is plenary. *Crocker v. Moore*, 429.

Under section 14 of Article VII of the Constitution, the General Assembly is given power to modify, change or abrogate all the provisions of Article VII, except sections 7, 9 and 13. *Crocker v. Moore*, 429.

LIBEL. See "Slander and Libel."

LIENS. See "Mechanic's and Laborer's Liens."

LIMITATION OF ACTIONS.

In an action for trespass commenced in 1902, in which defendants ask to have plaintiff declared trustee of the legal title for them, where plaintiff claims under an entry laid and surveyed in 1859, grant issued in 1867, and registered in 1884, and defendants claim under an entry laid in 1854, surveyed in 1885, entry price paid in 1858, and grant issued and registered in 1896, *held*, that the defendants are barred under section 158 of The Code. *McAden v. Palmer*, 258.

LIMITATION OF ACTIONS—*Continued.*

Section 158 of The Code covers all causes of action equitable or legal, not otherwise provided for. It bars the assertion of an equity as well as any other cause of action, unless there are circumstances which take the case out of the statute. *McAden v. Palmer*, 258.

In an action by one who claims as enterer of "Cherokee Lands," the cause of action is barred in ten years from the registration of the grant. *Frasier v. Gibson*, 272.

Revisal, section 394 (chapter 224, Laws 1895), which establishes the period of limitation as to permanent damages at five years, applies only to actions against railroad companies. *Cherry v. Canal Co.*, 422.

Where it is clear that the plaintiff's cause of action is barred by the statute of limitations, which is properly pleaded, an error as to permanent damage, if any was committed, is harmless and the judgment of nonsuit will not be disturbed. *Cherry v. Canal Co.*, 242.

In an action brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where it appeared that the entire wrong was done in 1898 and 1899, the action was barred under Revisal, section 395, sub-section 3. *Cherry v. Canal Co.*, 422.

Where there was execution against a life tenant in 1869 and sale thereunder and a subsequent conveyance back by the purchaser to him, the seven years' statute of adverse possession would not begin to run against the remainderman, till his death. *Norcum v. Savage*, 472.

The repeal of the disability of coverture by the Act of 1899 (Rev., sec. 363,) was not retroactive—no adverse possession, prior to February 13, 1899, being counted against a married woman. *Norcum v. Savage*, 472.

LIVE STOCK. See "Railroads."

MALICE. See "Slander and Libel."

MALICIOUS PROSECUTIONS.

In an action for malicious prosecution in suing out an attachment, justifiable probable cause is a belief by the attaching creditor, in the existence of facts essential to the prosecution of his attachment founded upon such circumstances as supposing him to be a man of ordinary caution, prudence and judgment, were sufficient to induce such belief. *Moore v. Bank*, 293.

MALICIOUS PROSECUTIONS—*Continued.*

When the facts are admitted, it is the duty of the court to declare, as a question of law, whether there is probable cause. *Moore v. Bank*, 293.

Those facts and circumstances alone which were known to defendant at the time of the affidavit upon which the warrant of attachment was based are to be considered in determining the question whether he had probable cause. *Moore v. Bank*, 293.

Evidence that plaintiff was indebted to defendant bank in a large amount which was unsecured and had been running for a long time, and though urged to do so, plaintiff had made no payment thereon; that he had withdrawn his account from the bank; that the bank knew of plaintiff's litigation with his wife and its disastrous effect upon his business and property, plaintiff having informed the bank that he owed $20,000 and had property enough to pay for it, "but he feared such would not be the case long;" that his property was encumbered with mortgages for $5,000.00 and with an inchoate dower right and a pending claim for alimony for $4,000.00; that plaintiff had sold nearly all of his personal property, had dismantled and shut down his mill, leased his store for two years, left the entire property uninsured and had gone to a distant State, *held*, that these facts constituted probable cause for attaching plaintiff's property. *Moore v. Bank*, 293.

The fact that the plaintiff owned a large quantity of real estate of large value is not material upon the question of probable cause. *Moore v. Bank*, 293.

MANDAMUS.

If the defendant board or its successor shall refuse to establish and maintain the school upon a constitutional basis and in accordance with the constitutional provisions, the courts have power, by the writ of *mandamus*, to compel them to do so. *Lowery v. School Trustees*, 33.

MARKET VALUE. See "Eminent Domain."

The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted may be considered and not merely the condition it is in at the time and the use to which it is then applied by the owner. *Brown v. Power Co.*, 333.

In an action to recover damages for breach of contract in failing to deliver goods having a market value, the general rule for

MARKET VALUE—*Continued.*

the measure of damages is the difference between the contract price and the market value "at the time when and place where they should have been delivered." *Hosiery Co. v. Cotton Mills*, 452.

In an action for deceit in falsely securing the execution of a deed, conveying timber which was reserved, where the defendant requested the court to instruct the jury that the extent of his liability was the market value of the timber at the date of the deed, there was no error committed in giving the instruction with the word market stricken out, the court saying, that while the market value should be considered as evidence of its value, it should not control—the question was what was its real value. *Griffin v. Lumber Co.*, 514.

MARRIAGE. See "Descent and Distribution;" "Trousseau."

By virtue of the provisions of the Act of March 10, 1866, the relation of man and wife existing between former slaves, if continued until the passage of the act, culminated into a valid marriage and was legalized by the statute. *Nelson v. Hunter*, 598.

The Act of March 10, 1866, has a retroactive effect so as to legalize the relation from the beginning of it, thereby legitimatizing all of the offspring of the cohabitation born during the entire period, and conduct after the passage of the act could not render the offspring of the union illegitimate. *Nelson v. Hunter*, 598.

It was competent for the defendants to prove that after the war and prior to March 10, 1866, S returned to his former home and lived and cohabited with his former slave wife, but they could not prove this by general reputation. *Nelson v. Hunter*, 598.

MARRIAGE LICENSES. See "Register of Deeds."

MARRIED WOMEN, CONTRACTS OF. See "Judgments."

A contract to pay for labor and material contracted for a dwelling on the wife's land (describing it) signed by husband and wife, acknowledged by them, and with privy examination of the wife, is binding upon her separate real estate under section 1826 of The Code by necessary implication, though she does not expressly charge it upon her estate. *Ball v. Paquin*, 83.

By construing section 6 in connection with section 3 of Article X of the Constitution, and section 1826 in connection with section 1781 of The Code, a lien is given upon the property of a married woman for all debts contracted for work and labor done. *Ball v. Paquin*, 83.

MARRIED WOMEN, CONTRACTS OF—*Continued.*

Discussion of the powers and rigths of married women in respect to their property and contracts, with a criticism of *dicta* in certain of the decisions. *Ball v. Paquin*, 83.

A demurrer, on the ground that the *feme* defendant was a married woman, was properly overruled, where it does not appear, on the face of the complaint, that she was a married woman at the date of the contract or the commencement of the action. *Ball v. Paquin*, 83.

MASTER AND SERVANT. See "Railroads;" "Negligence;" "Principal and Agent."

While the plaintiff was operating a lapper in a cotton mill it became choked and he stopped it with the belt shifter and put his hand into the beater bars to get the cotton out, and the machine, by some unknown means, started and tore his arm off, and there was evidence that the belt shifter was wider than the belt and that a piece of wood had been put on to make it correspond with the width of the belt, *held*, that the plaintiff, upon the doctrine of *res ipsa loquitur*, was entitled to have his case submitted to the jury. *Ross v. Cotton Mills*, 115.

In an action for damages for personal injuries from a defective machine, it is essential to the plaintiff's recovery that there shall be evidence that the defendant had notice, or could, by reasonable care, have known, of such defect. *Ross v. Cotton Mills*, 115.

The master is liable for negligence in respect to such acts and duties as he is required, or assumed to perform, without regard to the rank or title of the agent entrusted with their performance. *Tanner v. Lumber Co.*, 475.

MATERIAL MISREPRESENTATIONS. See "Insurance."

MEASURE OF DAMAGES. See "Damages."

MECHANIC'S AND LABORER'S LIENS.

By construing section 6 in connection with section 3 of Article X of the Constitution, and section 1826 in connection with section 1781 of The Code, a lien is given upon the property of a married woman for all debts contracted for work and labor done. *Ball v. Paquin*, 83.

Where the work done on a house and furnishing the material were all in the same contract, which was entire and indivisible, the contractor is entitled to a lien for the whole amount under the "mechanic's and laborer's lien law," and the judgment is superior to the homestead and personal property exemption. *Isler v. Dixon*, 529.

MENTAL ANGUISH. See "Telegraphs;" "Trousseau;" "Damages."

MENTAL CAPACITY. See "Deeds;" "Contracts;" "Wills."

MISJOINDER OF CAUSES OF ACTION. See "Pleadings."

MISJOINDER OF PARTIES. See "Pleadings."

MISREPRESENTATIONS. See "Insurance;" "Fraud."

MISTAKE. See "Reformation and Correction."

MORTUARY TABLES.

An instruction, on the issue as to damages, that the jury, having determined the decreased earning capacity for a year, must multiply that sum by the expectancy of the plaintiff as fixed by mortuary tables, is erroneous, in that it makes the mortuary tables conclusive as to the plaintiff's expectancy. *Sledge v. Lumber Co.*, 459.

MOTION TO DISMISS. See "Appeal and Error."

MUNICIPAL CORPORATIONS.

In an action against a city for personal injuries, where the evidence tended to show that the plaintiff was injured by falling through a culvert while walking along the streets of the city on a dark night and no lights on the street; that the culvert was considerably worn and covered with dirt; that the top planks were worn, sagged and broken and could be seen through and had been in this condition for several weeks before the plaintiff was hurt, and that she had not noticed this place before, *held*, that there was error in directing a nonsuit. *Fitzgerald v. Concord*, 110.

The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. *Fitzgerald v. Concord*, 110.

The town does not warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town "knew or by ordinary diligence might have discovered the defect, and the character of the defect was such that the injuries to travelers therefrom might reasonably be anticipated." *Fitzegarld v. Concord*, 110.

MUNICIPAL CORPORATIONS—*Continued.*

The use of ordinary diligence is required to detect defects from natural decay in wooden structures by making examinations, with reasonable frequency, to ascertain whether they are safe or not and knowledge of a defect may be inferred, notwithstanding it may have escaped the attention of all travelers, or even of an officer frequently passing by. *Fitzgerald v. Concord*, 110.

On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it had been in existence and use, the nature of the defect, its placing, etc. *Fitzgerald v. Concord*, 110.

Section 2601, Revisal, which requires railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands, applies to a town lot as well as in the country and to stock law and non-stock law territory. *Shepard v. Railroad*, 391.

Where the charter of the defendant city authorized it to operate an electric light plant for the purpose of furnishing lights to the inhabitants of the city and to charge for the use of said lights when furnished to private consumers, the city is responsible for the negligence of the commission established by chapter 41, Private Laws 1903, for the management and control of the plant. *Fisher v. New Bern*, 506.

Cities and towns, when acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, are liable to persons injured by the negligence of their servants, agents and officers; and it it is immaterial whether such servant, agent or officer be a corporation or an individual. *Fisher v. New Bern*, 506.

Where powers are granted to cities and towns for public purposes, exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hac* is to be regarded as a private company. *Fisher v. New Bern*, 506.

Where a live electric wire had broken and fallen down in the street, winding it up in a coil and hanging it up on an electric light pole about five and a half or six feet from the ground, in the

MUNICIPAL CORPORATIONS—*Continued.*

portion of a city frequented by many people and permitting it to remain suspended for two days, is evidence of negligence. *Fisher v. New Bern*, 506.

The duty imposed upon persons and corporations maintaining wires charged with electricity, upon the public streets and highways, to exercise a high degree of care for the protection of persons using such highways is imperative. *Fisher v. New Bern*, 506.

NECESSARY EXPENSES.

Working the roads is a necessary expense and the act authorizing the county commissioners to levy a tax for such purpose without a vote of the people is valid under Article VII, section 7, of the Constitution. *Crocker v. Moore*, 429.

NEGLIGENCE. See "Contributory Negligence;" "Railroads;" "Municipal Corporations;" "Trespass;" "Assumption of Risk;" "Master and Servant;" "Fellow Servant Act."

The doctrine of *res ipsa loquitur* does not dispense with the rule that he who alleges negligence must prove it. It is simply a mode of proving negligence and does not change the burden of proof. *Lyles v. Carbonating Co.*, 25.

An instruction that "it is the duty of the defendant's engineer or fireman to ring the bell or sound the whistle, or give other suitable and sufficient signals and warnings of the approach of its train, while moving its train in its yards, and to use all proper and reasonable efforts to avoid injuring any party who may be in its yards on legitimate business, and if the jury find that the defendant failed to give such signals and take such precautions, and said acts * * * resulted in the killing of the plaintiff's intestate, they should answer the first issue 'yes,'" is not contradictory. *Edwards v. Railroad*, 49.

An instruction that "the use of the highways and streets by the traveling public belongs as much to the public as the track does to the railway company, and for the company to block up the highways without absolute necessity, or to render its use so dangerous as to deter the public, or to keep them in constant fear of life and limb, would be a material and unlawful interference with their rights, and if the jury find * * * that the defendant so blocked up and obstructed a public highway, this would be evidence of negligence, and if such negligence caused the killing of the intestate, then the jury will answer the first issue 'yes,'" is correct. *Edwards v. Railroad*, 49.

In an action against a city for personal injuries, where the evidence tended to show that the plaintiff was injured by falling

NEGLIGENCE—*Continued.*

through a culvert while walking along the streets of the city on a dark night and no lights on the street; that the culvert was considerably worn and covered with dirt; that the top planks were worn, sagged and broken and could be seen through and had been in this condition for several weeks before the plaintiff was hurt, and that she had not noticed this place before, *held*, that there was error in directing a nonsuit. *Fitzgerald v. Concord*, 110.

The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. *Fitzgerald v. Concord*, 110.

The plaintiff alleged that his injuries were caused by the negligence of the defendant and specified different acts or omissions as constituting the negligence. When the court, at the close of the testimony, intimated that it would withdraw a portion of the plaintiff's evidence from the jury, it acted prematurely and the ruling at that time was calculated to embarrass and to handicap the plaintiff in the development of his case and necessarily to prejudice him, and the case will be remanded with direction to set aside the nonsuit taken in deference to the court's intimation. *Hayes v. Railroad*, 131.

The general rule in the law of damages is that all damage resulting from a single wrong or cause of action must be recovered in one suit. *Eller v. Railroad*, 140.

Where the defendant did not know of the intended marriage, the male plaintiff has no cause of action for the defendant's negligence in the delivery of the *feme* plaintiff's baggage, containing her trousseau. In this case the damage claimed was not in the contemplation of the parties and too remote. *Eller v. Railroad*, 140.

An instruction "if the jury shall find that the plaintiff was walking on the railroad track and that the defendant was backing its engine along the track in the night time in the direction of the plaintiff, and that there was no light at the time on the back part of the engine and no agent there to keep a lookout along the track, or being there, failed to exercise reasonable care in looking ahead along the track for any person on or near the track, or that no bell was ringing; and if the jury shall find that the engine so moving ran against or upon the intestate and killed her; and if the jury should further find

NEGLIGENCE—*Continued.*

that if the bell had been ringing and there had been a proper light on the engine, the intestate would have escaped the danger; or that if there had been a person stationed on the engine and was exercising reasonable care in keeping a lookout along the track, he would have discovered the intestate in time to have avoided striking her, then the jury should answer the first issue yes, and the second issue no," is not erroneous in declaring that the defense of contributory negligence did not avail the defendant under the conditions stated. *Reid v. Railroad,* 146.

In an action against a railroad for damages for the alleged negligent killing of the plaintiff's intestate at a crossing where there was evidence to show that an engine of the defendant was backing at night toward a crossing near the depot and ran over and killed the intestate, who at the time was lawfully upon the track endeavoring to cross it going to his home; that the engine was running without lights or signal warnings and without any one stationed so as to keep a proper lookout, *held,* that these facts fix the defendant with the legal responsibility for intestate's death. *Dixon v. Railroad,* 201.

Both the railroad when approaching a public crossing and the traveler on the highway are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty. *Cooper v. Railroad,* 209.

In an action for damages for the alleged negligent killing of plaintiff's intestate, an instruction that relieved the traveler of all obligation to look and listen when there had been a failure on the part of the defendant to give the ordinary signals, where there was evidence tending to show that there was an unobstructed view, is erroneous, and the fact that the court in other portions of the charge imposed on the plaintiff the obligation to look and listen whenever the view was unobstructed, does not help the matter. *Cooper v. Railroad,* 209.

A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty. *Cooper v. Railroad,* 209.

Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually

NEGLIGENCE—*Continued.*

be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence. *Cooper v. Railroad*, 209.

Negligence having first been established, facts and attendant circumstances may so qualify the obligation to look and listen, as to require the question of contributory negligence to be submitted to the jury, and in some instances, the obligation to look and listen may be altogether removed. *Sherrill v. Railroad*, 252.

In an action to recover damages for the negligent killing of plaintiff's intestate, where the evidence tends to prove that the intestate was run over by the defendant's train in its yard at night; that he was lying across the track unconscious; that the track was straight for a distance of 100 yards or more; that the headlight of the locomotive was burning; that the train was running slowly and was stopped within 80 feet after striking intestate, and that the engineer or fireman either saw the object lying across the track, or could easily have done so, for a distance of 100 yards or more, *held*, that the judge properly submitted the issues to the jury. *Plemmons v. Railroad*, 286.

In an action by an administratrix to recover damages for the alleged negligent killing of plaintiff's intestate, a motion to dismiss the action because the administratrix had not given an administration bond at the time the letters of administration were issued, was properly overruled, as the issuing of the letters cannot be collaterally attached in this action. *Plemmons v. Railroad*, 286.

In an action for damages for negligently failing to store and sell peanuts, where there was evidence from which the jury could have reasonably drawn the conclusion that the defendant had failed in the discharge of his duty to safely store the property, a motion to nonsuit was properly overruled. *Knowles v. Savage*, 372.

Where plaintiff arrived at a flag station on defendant's railroad, with his trunks, which were placed with checks on them in defendant's warehouse located on its right of way, and used for storing baggage and before the arrival of the next train, plaintiff went with defendant's clerk to this warehouse to recheck the trunks and after rechecking them started to take the approaching train, having a mileage book, and stepped in a hole in the platform adjoining the warehouse, and was in-

NEGLIGENCE—*Continued.*

jured, *held,* plaintiff was a passenger when injured and there was sufficient evidence of negligence to be submitted to the jury. *Pineus v. Railroad,* 450.

Where there was evidence tending to prove that one of the standards used to hold the logs in place was gone, an instruction that "when the plaintiff went on the log car for the purpose of riding, he assumed the risk of all the dangers incident to riding on a log train," was erroneous in that the court should have further stated that the plaintiff assumed no risk resulting from a defective car. *Tanner v. Lumber Co.,* 475.

The master is liable for negligence in respect to such acts and duties as he is required, or assumed to perform, without regard to the rank or title of the agent entrusted with their performance. *Tanner v. Lumber Co.,* 475.

Whether the animal should have been kept in the car or put in the stable, and what food and attention she should have received under the circumstances, were evidently questions of fact for the jury, to be considered by them in passing upon the question of negligence. *Fuller v. Railroad,* 480.

Negligence is the omission to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. *Fuller v. Railroad,* 480.

Where the charter of the defendant city authorized it to operate an electric light plant for the purpose of furnishing lights to the inhabitants of the city and to charge for the use of said lights when furnished to private consumers, the city is responsible for the negligence of the commission established by chapter 41, Private Laws 1903, for the management and control of the plant. *Fisher v. New Bern,* 506.

Cities and towns, when acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, are liable to persons injured by the negligence of their servants, agents and officers; and it is immaterial whether such servant, agent or officer be a corporation or an individual. *Fisher v. New Bern,* 506.

Where a live electric wire had broken and fallen down in the street, winding it up in a coil and hanging it up on an electric light pole about five and a half or six feet from the ground, in the portion of a city frequented by many people and permitting it to remain suspended for two days, is evidence of negligence. *Fisher v. New Bern,* 506.

NEGLIGENCE—*Continued.*

In an action for damages for personal injuries, where the evidence showed that the machine was an ordinary circular saw, which was securely fastened on a table five feet square and worked all right, and that there was nothing requiring special instruction, and that plaintiff was injured by running his hand under the table to clean out the sawdust box, without looking where he put it and could have easily seen the saw whirling under the table by stooping down and looking, *held*, the court erred in overruling a motion of nonsuit. *Mathis v. Manufacturing Co.*, 530.

NEGOTIABLE INSTRUMENTS.

The acceptance of a negotiable security for an open account suspends the right of action until the maturity of the note and then if the plaintiff will resort to his original cause of action, he must surrender the security. The acceptance of the promissory note, unless expressly so agreed upon, will not discharge the original cause of action. *Buggy Co. v. Dukes*, 393.

In an action for the unlawful conversion of the proceeds of certain buggies alleged to have been received under a contract of consignment, where the complaint sets out the entire transaction and defendant makes no point of the fact that his promissory notes given for the price of the buggies, are not tendered at the trial, but simply denies that he received the buggies upon the contract, and the jury have found the issue against him, his contention that plaintiff cannot retain his notes and at the same time prosecute an action against him for the amount received by him as agent, is without merit. *Buggy Co. v. Dukes*, 393.

A surety on a note is not discharged from liability by reason of the fact that he was not given notice of its dishonor. *Rouse v. Wooten*, 557.

Under Revisal, section 2342, the liability of a surety is primary, for he is, by the terms of the instrument, absolutely required to pay the same. *Rouse v. Wooten*, 557.

Where the name of the drawee is stamped on the back of a draft with a rubber stamp, by one having authority to do so and with intent to endorse it, it is a valid endorsement, but does not prove itself. *Mayers v. McRimmon*, 640.

Where the plaintiff at the trial presented the draft sued on, with the name of the drawee stamped on the back and testified that the draft had been discounted to him by the drawee before maturity for value and without notice, he is only the equitable owner, in the absence of proof that the instrument had been

NEGOTIABLE INSTRUMENTS—*Continued.*

endorsed, and he holds it subject to any valid defense open to the maker, and it was error to exclude evidence tending to show fraud. *Mayers v. McRimmon,* 640.

To constitute a holder in due course of a negotiable instrument payable to order, it is essential that the same shall be endorsed. *Mayers v. McRimmon,* 640.

NEWLY DISCOVERED EVIDENCE.

Where a motion is made in this court for a new trial for newly discovered evidence, the court never discusses the facts on such motion, but simply awards or refuses a new trial. *Crenshaw v. Street Railway Co.,* 192.

NEXT OF KIN. See "Statute of Distribution."

NON-RESIDENTS. See "Cattle Running at Large:" "Judgments."

NONSUIT.

The plaintiff alleged that his injuries were caused by the negligence of the defendant and specified different acts or omissions as constituting the negligence. When the court, at the close of the testimony, intimated that it would withdraw a portion of the plaintiff's evidence from the jury, it acted prematurely and the ruling at that time was calculated to embarrass and to handicap the plaintiff in the development of his case and necessarily to prejudice him, and the case will be remanded with direction to set aside the nonsuit taken in deference to the court's intimation. *Hayes v. Railroad,* 131.

Plaintiff may submit to an involuntary nonsuit, which he is driven or compelled to take, reserving leave to move afterwards to set the same aside, with a view not to abandon the prosecution of the suit, but to further prosecute it by appeal, in order to test the correctness of a ruling of the court which may otherwise be fatal to his case. *Hayes v. Railroad,* 131.

Where a plaintiff, in deference to an adverse intimation of the court, submits to a nonsuit, he is entitled in this court to the most favorable interpretation of the evidence, after excluding all that is against him. *Millhiser v. Leatherwood,* 231.

An intimation of an opinion by the judge adverse to the plaintiff upon some proposition of law, which does not "take the case from the jury," and which leaves open essential matters of fact still to be determined by them, will not justify the plaintiff in suffering a nonsuit and appealing. Such nonsuits are premature and the appeals will be dismissed. *Midgett v. Manufacturing Co.,* 361.

NONSUIT—*Continued.*

In an action for damages for negligently failing to store and sell peanuts, where there was evidence from which the jury could have reasonably drawn the conclusion that the defendant had failed in the discharge of his duty to safely store the property, a motion to nonsuit was properly overruled. ***Knowles v. Savage,*** 372.

Where the plaintiff asked for an accounting, averring that the defendant was indebted to him and the defendant submitted to an account, averring that the plaintiff owed him a balance, and an account was taken and report made and exceptions filed by plaintiff, the court committed no error in denying a motion for nonsuit. ***Boyle v. Stallings,*** 524.

In cases purely equitable in their nature, if an account has been taken and report made, the plaintiff will not be allowed to suffer judgment of nonsuit. ***Boyle v. Stallings,*** 524.

NOTES AND BILLS. See "Negotiable Instruments."

NOTICE OF DISHONOR. See "Principal and Surety."

NOVATION. See "Rescission."

OFFICES.

When an act creates an office to commence at a certain time and directs its incumbent to perform certain duties which, though formerly belonging to another office, are required by law to be performed annually at a specified time, the officer must perform them, if at all, at the time specified. ***Fortune v. Commissioners,*** 322.

OFFSPRING. See "Descent and Distribution."

OPEN ACCOUNTS. See "Suspension of Right of Action.."

OPINION BY JUDGE.

A prayer to charge that "even if the fire was communicated to the defendant's right-of-way, the plaintiff cannot recover, for the engine was in good repair and equipped with an improved spark arrester for preventing the escape of sparks, and was managed in a careful manner by a skillful and competent engineer, and the evidence as to this is uncontroverted and uncontradicted," was properly refused because it would have been an expression of opinion upon the facts, forbidden by Revisal, section 535. ***Williams v. Railroad,*** 623.

OPTIONS. See "Contracts;" "Specific Performance;" "Partnership."

A paper writing, by which the defendant binds himself at any time previous to a fixed date, to sell a certain tract of land to

OPTIONS—*Continued.*

any one whom the plaintiff may direct for a designated sum, is a unilateral contract or an option, where the plaintiff has never obligated himself to pay said sum. *Alston v. Connell,* 485.

PARTIES. See "Husband and Wife;" "Pleadings."

The defendant having entered a general denial, any defect of parties which may have existed is waived; and if permanent damage is shown impairing the value of the inheritance, the plaintiff, as owner of two-thirds of the reversion after the life estate, has a right of action for the full amount of damage done to his two-thirds interest in the property. *Cherry v. Canal Co.,* 422.

Judgments rendered by a justice of the peace, entitled "McAfee Estate by Cora McAfee, Agent, against W. A. Gregg and Wife, Addie," and docketed in the Superior Court, are not void either because of the alleged defect as to parties plaintiff or because it appears in the summons that the defendant Addie was then married, and it was error to dismiss supplemental proceedings brought to enforce their payment. *McAfee v. Gregg,* 448.

In an action brought by the husband alone for damages to land which had been conveyed to the husband and wife and which they held by entireties, the wife was not a necessary party. *West v. Railroad,* 620.

PARTIES, MISJOINDER OF. See "Pleadings."

PARTNERSHIP.

During the continuance of a partnership, one partner cannot sue another on any special transaction which may be made an item of charge or discharge in a general partnership account. *Ledford v. Emerson,* 288.

One partner, during the continuance of the partnership, cannot ordinarily bring trover or trespass against the other by reason of acts concerning partnership property, unless the same be destroyed or removed entirely beyond the reach or control of the complaining party. *Ledford v. Emerson,* 288.

Where a partnership has terminated and all debts have been paid and the partnership affairs otherwise adjusted, or where the partnership was for a single venture or special purpose which has been closed, and nothing remains but to pay over the amount due, in either case an action will lie in favor of one against the other. *Ledford v. Emerson,* 288.

PARTNERSHIP—*Continued.*

Where an action at law will lie by one partner against another, if the facts bring the claim within the provisions of our statutes on arrest and bail, the plaintiff is entitled to this ancillary remedy. *Ledford v. Emerson*, 288.

When the plaintiff sues to recover his share arising from a sale of certain options on land, which the plaintiff took in the name of the defendant under an agreement that the defendant was to advance the incidental expenses, sell the options and divide the profits equally, it was error to discharge an order of arrest of the defendant allowed upon proof of fraud on his part in connection with the sale of the options. *Ledford v. Emerson*, 289.

PASSENGERS. See "Railroads."

PENALTIES. See "Register of Deeds."

PERMANENT DAMAGES. See "Trespass;" "Damages."

PERSONAL PROPERTY EXEMPTIONS. See "Exemptions."

PERSONALTY. See "Statute of Distribution."

PETITIONERS FOR ELECTION. See "Elections."

PLEADINGS. See "Appeal and Error;" "Practice."

A demurrer that does not specify wherein the complaint fails to state facts sufficient to constitute a cause of action, is general and is not allowable. *Ball v. Paquin*, 83.

A demurrer, on the ground that the *feme* defendant was a married woman, was properly overruled, where it does not appear, on the face of the complaint, that she was a married woman at the date of the contract or the commencement of the action. *Ball v. Paquin*, 83.

Where the defendant in his answer sets up a mistake in a deed under which he claims, but does not pray for a reformation thereof, yet the court may award such relief, if the allegations of the answer and the findings of the jury upon appropriate issues justify it. *Manufacturing Co. v. Cloer*, 128.

Where a complaint charges that the defendant, with the consent of a corporation, his co-defendant, converted the corporation and all of its assets to his own use and used and manipulated the corporation and its property for his own benefit and managed it recklessly and disposed of its property to defraud the stockholders, and one general object of the complaint is to recover property belonging to the plaintiff which the two

PLEADINGS—*Continued.*

defendants confederated to destroy, *held*, that a demurrer for misjoinder of parties and causes of action was properly overruled, it appearing that the two defendants are so intimately connected with the transactions that it would be almost impossible to investigate any of the grounds of complaint, unless both are made parties. *Oyster v. Mining Co.*, 135.

Where a general right is claimed, arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter in one suit. *Oyster v. Mining Co.*, 135.

In an action for the recovery of land if the defendant wishes to disclaim as to any portion of the *locus in quo* and put in issue the title to only a specific portion, he should do so in his answer. *Crawford v. Masters*, 205.

In order to derive any benefit from a former judgment as a bar to the prosecution of a pending suit, such judgment, even in actions before a justice of the peace, must be specially pleaded and will not be considered under the plea merely denying the indebtedness alleged in the complaint. *Smith v. Lumber Co.*, 375.

When the parties come to trial in a justice's court, the justice should require the plaintiff to state "in a plain and direct manner the facts constituting the cause of action" and a denial by defendant or other facts constituting a defense. *Smith v. Newberry*, 385.

While an action for breach of warranty arises out of contract and deceit is for a tort, yet when they both arise out of the same transaction they may be joined. *Smith v. Newberry*, 385.

A defense in the nature of a plea in confession and avoidance must be specially pleaded. *Smith v. Newberry*, 385.

An exception to the admission against the defendant of certain sections in his original answer—he having been allowed to file an amended answer—cannot be sustained. *Norcum v. Savage*, 472.

Where all the facts which go to make out an estoppel are set out in the pleadings, the estoppel is sufficiently pleaded, though it is not claimed as an estoppel in terms. *Alston v. Connell*, 485.

Where the plaintiff asked for an accounting, averring that the defendant was indebted to him and the defendant submitted to

PLEADINGS—*Continued.*

an account, averring that the plaintiff owed him a balance, *held*, that the defendant did in substance set up a counterclaim. *Boyle v. Stallings*, 524.

In an action for indemnity on an accident policy where the answer set up a breach of warranty by way of defense, a reply was not required, and the court properly submitted an issue as to whether the defendant had knowlege of the mental and physical condition of the plaintiff at the time the policy was issued. *Fishblate v. Fidelity Co.*, 589.

PLEADINGS AS EVIDENCE. See "Pleadings;" "Evidence."

POLL TAX. See "Taxation;" "Elections."

POSSESSION. See "Adverse Possession;" "Trespass."

If the defendants had shown possession of the land, their delay of eighteen years in suing would not have precluded them from seeking the aid of the court in converting the plaintiff into a trustee for their benefit, but as they show no such possession, they have slept on their rights too long. *McAden v. Palmer*, 258.

The actual possession of land does not in itself constitute seizin. *Redding v. Vogt*, 562.

PRACTICE. See "Injunctions;" "Appeal and Error;" "Pleadings."

Where a final judgment was rendered and no exception was entered and no appeal taken, but the amount recovered and the costs were paid, the vitality of that suit and the judgment therein was fully spent and the latter cannot be re-opened and the suit revived by any sort of proceedings known to the law. *Bunker v. Bunker*, 18.

In an action for an accounting where it is alleged that a certain item of costs in another action was a proper charge against the defendant, and was first allowed by the referee and afterwards omitted from his account reported in obedience to an order requiring a new account to be taken and stated, to which omission plaintiff excepted and thereafter a final judgment was rendered which did not in terms include this allowance, but provided on the contrary that plaintiff should recover a certain sum and the costs of action, which necessarily excluded from the judgment the recovery of said certain item of costs, *held*, that the court erred at a subsequent term in ordering the case reinstated on the docket for further proceedings where there was no exception to the judgment and no appeal taken therefrom. *Bunker v. Bunker*, 18.

PRACTICE—*Continued.*

A finding by the jury, that the plaintiff's intestate was guilty of contributory negligence, makes it unnecessary to consider an exception to a refusal of a prayer of defendant as to contributory negligence. *Edwards v. Railroad,* 49.

If the defendant relied upon the equitable matter set out in the answer, it was his duty to tender appropriate issues upon which the facts set out could be found. *Manufacturing Co. v. Cloer,* 128.

Where the defendant in his answer sets up a mistake in a deed under which he claims, but does not pray for a reformation thereof, yet the court may award such relief, if the allegations of the answer and the findings of the jury upon appropriate issues justify it. *Manufacturing Co. v. Cloer,* 128.

The plaintiff alleged that his injuries were caused by the negligence of the defendant and specified different acts or omissions as constituting the negligence. When the court, at the close of the testimony, intimated that it would withdraw a portion of the plaintiff's evidence from the jury, it acted prematurely and the ruling at that time was calculated to embarrass and to handicap the plaintiff in the development of his case and necessarily to prejudice him, and the case will be remanded with direction to set aside the nonsuit taken in deference to the court's intimation. *Hayes v. Railroad,* 131.

Plaintiff may submit to an involuntary nonsuit, which he is driven or compelled to take, reserving leave to move afterwards to set the same aside, with a view not to abandon the prosecution of the suit, but to further prosecute it by appeal, in order to test the correctness of a ruling of the court which may otherwise be fatal to his case. *Hayes v. Railroad,* 131.

The tendering of witnesses by the defendant for the purpose of having their fees taxed as costs does not amount to the introduction of evidence within the meaning of the Superior Court, rule 3, and does not take from the defendant the right to open and conclude the argument. *Brown v. Railroad,* 154.

Where a motion is made in this court for a new trial for newly discovered evidence, the court never discusses the facts on such motion, but simply awards or refuses a new trial. *Crenshaw v. Street Railway Co.,* 192.

In an action for the recovery of land the judgment must follow and conform to the verdict in designating the extent of the recovery, and must be rendered for the premises described in the complaint. *Crawford v. Masters,* 205.

PRACTICE—*Continued.*

Where a plaintiff, in deference to an adverse intimation of the court, submits to a nonsuit, he is entitled in this court to the most favorable interpretation of the evidence, after excluding all that is against him. *Millhiser v. Leatherwood*, 231.

An intimation of an opinion by the judge adverse to the plaintiff upon some proposition of law, which does not "take the case from the jury," and which leaves open essential matters of fact still to be determined by them, will not justify the plaintiff in suffering a nonsuit and appealing. Such nonsuits are premature and the appeals will be dismissed. *Midgett v. Manufacturing Co.*, 361.

Where two causes of action were set forth in a warrant before a justice of the peace (treated as a complaint), the judge properly submitted the issue upon the cause of action which was sustained by the evidence. *Smith v. Newberry*, 385.

Where a case was tried below in the fall and docketed in this court three days before the district was called at the opening of the spring term, a motion on the first day of the spring term to dismiss the appeal because not docketed seven days before the call of the district as required by rule 5, will be denied. *Craddock v. Barnes*, 427.

Revisal, section 548, contemplates that the issues shall be drawn before the introduction of testimony. *Beasley v. Surles*, 605.

Where an objection for defect of parties was made below and overruled, this court will not exercise its discretionary power of amendment to destroy an exception duly taken below. *West v. Railroad*, 620.

Permitting the surveyor, during his examination, to indicate upon the map of the official survey by small red lines the boundaries of certain deeds which defendants had introduced in evidence is a matter within the sound discretion of the trial judge. *Bullard v. Hollingsworth*, 634.

PRAYERS FOR INSTRUCTIONS. See "Instructions."

PREFERENCES. See "Bankruptcy."

PRESUMPTIONS.

Every presumption is in favor of the validity of an act of the Legislature and all doubts are resolved in support of the act. *Lowery v. School Trustees*, 33.

In the case of an insane person, one wholly incompetent to contract, the law presumes fraud from the condition of the par-

PRESUMPTIONS—*Continued.*

ties, the presumption being stronger or weaker, according to the position or condition of the parties with respect to each other. *Sprinkle v. Wellborn*, 163.

A presumption of fraud is raised from a transaction with a person *non compos mentis*, without the aid of any evidence of actual imposition, by the very nature of the transaction. *Sprinkle v. Wellborn*, 163.

The burden is upon the plaintiff to show that a prior entry was invalid for indefiniteness, for in the absence of any proof to the contrary, the court must assume that the entry and survey conformed to the statute. *Frasier v. Gibson*, 272.

Chapter 773, Acts 1905, by doing away with the necessity of proving that title to land in Hertford County is out of the State does not go further and provide that the title should be presumed to be in any person who may bring suit and exhibit a perfect chain of deeds without any proof of title, but the claimant must also show by proof sufficient in law for that purpose, that he has in some way acquired the title. *Mitchell v. Garrett*, 397.

A prayer to instruct the jury that from thirty years' adverse possession against the State all that is necessary to show complete title out of the State is presumed, was correctly modified by adding after the word "possession" the following words: "Such possession having been ascertained and identified under known and visible lines or boundaries." Revisal, section 380. *Bullard v. Hollingsworth*, 634.

PRINCIPAL AND AGENT. See "Bankruptcy;" "Master and Servant;" "Husband and Wife;" "Insurance."

Where it is established that debtor at the time of the alleged preferential payment to his father, was the latter's general financial agent, and that he practically paid himself for his father, it follows that his personal knowledge of his own utter insolvency is imputable to his principal and that the father is affected by all knowledge possessed by his son, his agent. *Wright v. Cotten*, 1.

Where the agent of the creditor had reasonable cause at the time to believe the debtor insolvent, and knew that the transaction was in fraud of the bankruptcy law, it is the same as if the creditor himself had taken part therein, with the same cause to believe and the same knowledge. *Wright v. Cotten*, 1.

What an agent says while doing acts within the scope of his agency is admissible as a part of the *res gestae*. What he says after-

PRINCIPAL AND AGENT—*Continued.*

wards concerning his acts is hearsay and inadmissible. *Hamrick v. Telegraph Co.*, 151.

The clause in an accident policy that "no notice or knowledge of the agent or any other person shall be held to effect a waiver or change in this contract or any part of it," is ineffective for the purpose designed. *Fishblate v. Fidelity Co.*, 589.

PRINCIPAL AND SURETY.

A surety company which has been called upon to pay a *devastavit* committed by its principal, an administrator, is entitled to be subrogated to the rights of the creditor against a party who received the money with knowledge of its wrongful appropriation and his rights are exactly those of the creditor. *Caviness v. Fidelity Co.*, 58.

Where the solvent sureties paid the amount due on a judgment against the principal and the sureties and caused the same to be assigned for their benefit, and the plaintiff was designated as agent to collect what he could from the insolvent sureties, and as such agent held the balance due on the judgment and in pursuance of this arrangement, took from the defendant, an insolvent surety, a note and mortgage which was to be in full payment of his liability on said judgment, *held*, that a judgment for the full amount of the note was .proper, the *pro rata* due from the defendant being more than the amount of the note. *Chadbourn v. Durham*, 501.

A surety on a note is not discharged from liability by reason of the fact that he was not given notice of its dishonor. *Rouse v. Wooten*, 557.

Under Revisal, section 2342, the liability of a surety is primary, for he is, by the terms of the instrument, absolutely required to pay the same. *Rouse v. Wooten*, 557.

PRIMA FACIE CASE. See "Itemized Accounts."

PRIMARY LIABILITY. See "Principal and Surety."

PRIVILEGED COMMUNICATIONS. See "Slander and Libel."

PROBABLE CAUSE. See "Malicious Prosecutions."

PROCESSIONING.

In a proceeding under the "Processioning Act," chapter 22, Laws 1893, to establish a disputed line, the burden of proof is upon the plaintiff. *Hill v. Dalton*, 9.

In a processioning proceeding the plaintiff may not, where there is a call for course and distance and a natural object or line of

PROCESSIONING—*Continued.*

another contract, stop at the end of the call for course and distance, but must either show the location of the natural object or the line called for, or show that at the time his line was surveyed, a line was run and a corner marked corresponding with the call for course and distance, or that there was never any such object or line, as called for. *Hill v. Dalton,* 9.

The question of title is not in issue in a proceeding for processioning for establishing a disputed line. *Hill v. Dalton,* 9.

In a processioning proceeding, where the question in controversy was the location of the R grant, and to do this it was necessary to locate the M grant, evidence to show that the latter was not properly located because it did not correspond with the former, was properly excluded, as the lines of the senior grant, the controlling object, cannot be established by the lines of the junior grant. *Hill v. Dalton,* 9.

PROFITS.

Where the profits lost by defendant's tortious conduct, proximately and naturally flow from his act and are reasonably definite and certain, they are recoverable; those which are speculative and contingent, are not. *Johnson v. Railroad,* 574.

PROVISOS. See "Insurance."

PUBLIC LANDS. See "Cherokee Lands;" "Entries and Grants."

PUBLIC SCHOOLS. See "Schools."

PUNITIVE DAMAGES. See "Damages;" "Railroads."

QUESTIONS FOR COURT.

The meaning of the terms of a contract whether written or verbal, when they are precise and explicit, is a question for the court, but if doubtful and uncertain, they may be submitted to the jury, with proper instructions, to ascertain the meaning and intent of the parties. *Wilson v. Cotton Mills,* 52.

The standard of privilege is the standard of the law, not of the individual, and the privilege depends not on what the individual may have supposed to be his interest or duty, but upon what a judge decides, as a matter of law, his interest or duty to have been. *Gattis v. Kilgo,* 106.

When the facts are admitted, it is the duty of the court to declare, as a question of law, whether there is probable cause. *Moore v. Bank,* 293.

What will amount to an abandonment of a contract is a question of law and the acts and conduct which are relied on to constitute

QUESTIONS FOR COURT—*Continued.*

the abandonment should be clearly proved, and they must be positive, unequivocal and inconsistent with the existence of a contract, but when thus established they will bar the right to specific performance. *May v. Getty*, 310.

QUESTIONS FOR JURY.

If the parties to an agreement dispute about its terms, an issue of fact is raised, as to the terms, to be decided by the jury who should be guided by instructions from the court. *Wilson v. Cotton Mills*, 52.

Whether one has exceeded the privilege and whether he was actuated by malice are ordinarily questions for the jury. *Gattis v. Kilgo*, 106.

On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it had been in existence and use, the nature of the defect, its placing, etc. *Fitzgerald v. Concord*, 110.

In an action against a register of deeds to recover the penalty under section 2090 of the Revisal, where there is a conflict of evidence, whether there has been "reasonable inquiry" is to be submitted to the jury upon all the evidence under proper instruction; but if the facts are agreed, it is a matter of law. *Furr v. Johnson*, 157.

Where there is any evidence that reasonably tends to prove the fact in issue, or where the credibility of the witnesses introduced by either party must be passed upon, the question of fact involved is always one for the jury under proper instructions from the court as to the law. *Smith v. Lumber Co.*, 375.

Whether the animal should have been kept in the car or put in the stable, and what food and attention she should have received under the circumstances, were evidently questions of fact for the jury, to be considered by them in passing upon the question of negligence. *Fuller v. Railroad*, 480.

The question of reasonable time is a mixed question of law and fact, and except where the facts are few, simple and undisputed, and where only one inference can be drawn, or except where the time is so short or so long that the court may declare it reasonable or unreasonable, it should be left to the

QUESTIONS FOR JURY—*Continued.*

sound discretion of the jury under the instruction of the court upon the particular circumstances of the case. *Claus v. Lee,* 552.

In determining whether or not language used in connection with the sale of personal property constitutes a warranty, it is proper for the jury to consider the testimony in the light of the language used, the spirit in which the parties met and all of the other circumstances, and to find therefrom the intent with which the words were used by the seller and understood by the defendant, with proper instructions as to what constitutes warranty. *Beasley v. Surles,* 605.

RAILROADS. See "Negligence;" "Contributory Negligence;" "Assumption of Risk;" "Fellow Servant Act;" "Carriers;" "Master and Servant;" "Corporation Commission."

An instruction that "it is the duty of the defendant's engineer or fireman to ring the bell or sound the whistle, or give other suitable and sufficient signals and warnings of the approach of its train, while moving its train in its yards, and to use all proper and reasonable efforts to avoid injuring any party who may be in its yards on legitimate business, and if the jury find that the defendant failed to give such signal and take such precautions, and said acts * * * resulted in the killing of the plaintiff's intestate, they should answer the first issue 'yes,'" is not contradictory. *Edwards v. Railroad,* 49.

An instruction that "the use of the highways and streets by the traveling public belongs as much to the public as the track does to the railway company, and for the company to block up the highways without absolute necessity, or to render its use so dangerous as to deter the public, or to keep them in constant fear of life and limb, would be a material and unlawful interference with their rights, and if the jury find * * * that the defendant so blocked up and obstructed a public highway, this would be evidence of negligence, and if such negligence caused the killing of the intestate, then the jury will answer the first issue 'yes'" is correct. *Edwards v. Railroad,* 49.

The issue, "Did the defendant maliciously or wilfully, wantonly and rudely mistreat and humiliate the plaintiff while a passenger on its train?" is a pure issue of fact, and the finding of the jury is conclusive, the judge having refused to set the verdict aside. *Hutchinson v. Railroad,* 123.

RAILROADS—*Continued.*

It is a reasonable regulation of the defendant that certain trains shall not stop at all stations, provided there are enough to serve the purposes of local travel. *Hutchinson v. Railroad,* 123.

It is the duty of the defendant to have an agent at the gate to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into the train, without objection, with a ticket calling for a regular station, as her destination, and nothing on its face to show it was not good on that train, and she not knowing that that train did not stop there, it was the duty of the defendant to stop the train at that point for her. *Hutchinson v. Railroad,* 123.

On the question of damages, the court correctly instructed the jury that if the conductor maliciously or with wanton recklessness carried the plaintiff by her station, or if he maliciously or wantonly mistreated and humiliated her, they could assess punitive damages. *Hutchinson v. Railroad,* 123.

Under section 1963 of The Code, when a passenger is carried by his station, he is entitled to damages, and this, though there is no bodily harm, or actual damages. If it is done recklessly or wilfully, he is entitled to punitive damages. *Smith v. Railroad,* 130 N. C., 304, overruled. *Hutchinson v. Railroad,* 123.

In an action for wrongfully causing the death of plaintiff's intestate at a crossing, an instruction that where an engine was backing on a crossing in the night time, it was the duty of the engineer to sound adequate warning and to keep a man with a light at the front of the engine as it was moving, so as to keep a lookout adequate for safety; and if there was failure in this respect and an injury resulted, there would be a negligent breach of duty, is correct, and the fact that the crossing may be also used as a part of the railroad yard or that the street ran down the track for some distance, does not change the principle. *Reid v. Railroad,* 146.

An instruction "if the jury shall find that the plaintiff was walking on the railroad track and that the defendant was backing its engine along the track in the night time in the direction of the plaintiff, and that there was no light at the time on the back part of the engine and no agent there to keep a lookout along the track, or being there, failed to exercise reasonable care in looking ahead along the track for any person on or near the track, or that no bell was ringing; and if the jury shall find that the engine so moving ran against or upon the

RAILROADS—*Continued.*

intestate and killed her; and if the jury should further find that if the bell had been ringing and there had been a proper light on the engine, the intestate would have had notice of the approaching train in time and would have escaped the danger; or that if there had been a person stationed on the engine and was exercising reasonable care in keeping a lookout along the track, he would have discovered the intestate in time to have avoided striking her, then the jury should answer the first issue yes, and the second issue no," is not erroneous in declaring that the defense of contributory negligence did not avail the defendant under the conditions stated. *Reid v. Railroad,* 146.

Where plaintiff's intestate had gone on the crossing at Third street in an effort to cross the railroad and was told by an employee of the defendant that a freight train then obstructed the crossing at that point, and that she had better try the Second street crossing, and following these instructions she essayed the latter crossing and was endeavoring to cross when an engine backed upon her and death resulted, *held,* that the intestate was no trespasser and there was no contributory negligence in the mere fact that she was then upon the road. *Reid v. Railroad,* 146.

In an action against a railroad for an alleged wrongful ejection, to entitle a passenger to punitive damages, his expulsion from the train must be attended by such circumstances as tend to show rudeness, insult, aggravating circumstances calculated to humiliate him. *Ammons v. Railroad,* 196.

In an action against a railroad for damages for the alleged negligent killing of the plaintiff's intestate at a crossing where there was evidence to show that an engine of the defendant was backing at night toward a crossing near the depot and ran over and killed the intestate, who at the time was lawfully upon the track endeavoring to cross it going to his home; that the engine was running without lights or signal warnings and without any one stationed so as to keep a proper lookout, *held,* that these facts fix the defendant with the legal responsibility for intestate's death. *Dixon v. Railroad,* 201.

Both the railroad when approaching a public crossing and the traveler on the highway are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty. *Cooper v. Railroad,* 209.

In an action for damages for the alleged negligent killing of plaintiff's intestate, an instruction that relieved the traveler of

RAILROADS—*Continued.*

all obligation to look and listen when there had been a failure on the part of the defendant to give the ordinary signals, where there was evidence tending to show that there was an unobstructed view, is erroneous, and the fact that the court in other portions of the charge imposed on the plaintiff the obligation to look and listen whenever the view was unobstructed, does not help the matter. *Cooper v. Railroad,* 209.

Evidence tending to show that the intestate was in a covered wagon and that he drove on the crossing without any stop whatever and with the wagon cover down on the side from which the train approached and at a point just on the edge of the wagon road and 13 feet from the center of the railroad track one could see down the track from 500 to 1,200 feet, in the direction from which the trains approached, was sufficient for the consideration of the jury on the issue of contributory negligence. *Cooper v. Railroad,* 209.

A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty. *Cooper v. Railroad,* 209.

Where the view is unobstructed, a traveler, who attempts to cross a railroad track under ordinary and usual conditions without first looking, when, by doing so, he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence. *Cooper v. Railroad,* 209.

Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence. *Cooper v. Railroad,* 209.

There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether as when gates are open or signals given by watchman and the traveler enters on the crossing reasonably relying upon the assurance of safety. *Cooper v, Railroad,* 209.

One who enters on a public railroad crossing is required to look and listen, and when he fails in this duty and is injured in

RAILROADS—*Continued.*

consequence, the view being unobstructed, under ordinary conditions such person is guilty of contributory negligence. *Sherrill v. Railroad*, 252.

Where the testimony of the plaintiff tended to show that his duties by contract with the defendant railroad caused him to work almost on the track and frequently required him to be upon and across it, and that while so engaged he was run over by an engine of the defendant which had come upon him without any warning, and which warning was required both by the custom and rules of the railroad, and that he had just looked and listened both ways, and the way then appeared clear, *held*, that a nonsuit was erroneous as the question of contributory negligence must be left to the jury to determine under proper instructions. *Sherrill v. Railroad*, 252.

In an action to recover damages for the negligent killing of plaintiff's intestate, where the evidence tends to prove that the intestate was run over by the defendant's train in its yard at night; that he was lying across the track unconscious; that the track was straight for a distance of 100 yards or more; that the headlight of the locomotive was burning; that the train was running slowly and was stopped within 80 feet after striking intestate, and that the engineer or fireman either saw the object lying across the track, or could have easily done so, for a distance of 100 yards or more, *held*, that the judge properly submitted the issues to the jury. *Plemmons v. Railroad*, 280.

The condemnation for the purpose of building and operating a railroad did not deprive the plaintiff of the use of her land except to the extent that it was necessary for the operation of the road. For any additional burden she was entitled to compensation to be measured with reference to the limited easement of the railroad. *Brown v. Power Co.*, 333.

Section 2601, Revisal, which requires railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands, applies to a town lot as well as in the country and to stock law and non-stock law territory. *Shepard v. Railroad*, 391.

A deed to the right of way gives a railroad no more rights than it would have acquired by condemnation. *Shepard v. Railroad*, 391.

Revisal, section 394 (chapter 224, Laws 1895), which establishes the period of limitation as to permanent damages at five years, applies only to actions against railroad companies. *Cherry v. Canal Co.*, 422.

RAILROADS—*Continued.*

The following telegram sent by defendant's general road master to plaintiff," "Can offer you extra force at $65 per month. Will want you at once to ditch D. & N. Road and R. & G. Answer quick. Job will last all the year," constituted an offer of employment for the remainder of the year, which became binding upon acceptance. *King v. Railroad,* 433.

The above special contract of employment was not affected by the rules of defendant company, known to plaintiff, that its servants are employed by the month subject to be discharged at its will. *King v. Railroad,* 433.

Where plaintiff arrived at a flag station on defendant's railroad, with his trunks, which were placed with checks on them in defendant's warehouse located on its right of way, and used for storing baggage and before the arrival of the next train, plaintiff went with defendant's clerk to this warehouse to recheck the trunks and after rechecking them started to take the approaching train, having a mileage book, and stepped in a hole in the platform adjoining the warehouse, and was injured, *held,* plaintiff was a passenger when injured and there was sufficient evidence of negligence to be submitted to the jury. *Pineus v. Railroad,* 450.

The duty of a railroad company in respect to keeping safe station premises extends to all who rightfully come upon the premises on legitimate business to be transacted with its agent, and this duty extends to flag as well as regular stations. *Pineus v. Railroad,* 450.

In an action for personal injuries, an instruction on the issue as to contributory negligence that "if the plaintiff was asleep and was thrown off the car by a sudden jerk caused by the negligence of the engineer or by pulling out the slack, and that said slack was the result of having no brakes on the cars, then the jury should answer the issue 'no,'" is erroneous, for if the negligence of the plaintiff in going to sleep on a moving train concurred with the defendant's negligence as the proximate cause of the injury, this would be contributory negligence. *Sledge v. Lumber Co.,* 459.

The contention that the Fellow Servant Act (Rev., sec. 2646,) applies to the defendant, Frank Hitch Lumber Co., cannot be determined where its answer denied that it owned or operated the logging railroad and no appropriate issues were submitted. *Tanner v. Lumber Co.,* 475.

Where the defendant undertook to furnish the plaintiff transportation on its log train to and from "quarters," it was its duty

RAILROADS—*Continued.*

to see that such transportation was rendered as reasonably safe as the character of it would admit. *Tanner v. Lumber Co.*, 475.

Where there was evidence tending to prove that one of the standards used to hold the logs in place was gone, an instruction that "when the plaintiff went on the log car for the purpose of riding, he assumed the risk of all the dangers incident to riding on a log train," was erroneous in that the court should have further stated that the plaintiff assumed no risk resulting from a defective car. *Tanner v. Lumber Co.*, 475.

The master is liable for negligence in respect to such acts and duties as he is required, or assumed to perform, without regard to the rank or title of the agent entrusted with their performance. *Tanner v. Lumber Co.*, 475.

In an action to recover damages for an alleged injury to a mare, an instruction "that if the jury find that the defendant had stables at that point; and the defendant knew that it would not be able to forward the mare to her destination till the next morning, and kept her in its car on the track all night without other food or attention than has been testified to, the defendant was guilty of negligence, and if you find that the mare was damaged in consequence of such negligence, you will answer the first issue 'yes,'" is erroneous. *Fuller v. Railroad*, 480.

Whether the animal should have been kept in the car or put in the stable, and what food and attention she should have received under the circumstances, were evidently questions of fact for the jury, to be considered by them in passing upon the question of negligence. *Fuller v. Railroad*, 480.

In an action to recover damages for wrongful ejection, where the evidence showed that the plaintiff, who was a passenger, was wrongfully put off the defendant's train at night in the country, and that the conductor and brakeman took hold of him and forcibly ejected him in the presence of other passengers, and that the conductor was rude, stern, harsh and humiliating in his demeanor towards plaintiff, the court did not err in submitting the assessment of punitive damages to the jury. *Parrott v. Railroad*, 546.

Where the defendant was permitted to prove the custom of the conductor in regard to taking up tickets and checking passengers from all stations, the testimony of witnesses that this conductor had on previous occasions called upon each of them for a ticket after it had been surrendered to him, was competent for the purpose of rebutting this custom and showing its fallibility. *Parrott v. Railroad*, 546.

RAILROADS—*Continued.*

In an action for damages for the negligent burning of plaintiff's factory, evidence that plaintiffs had a contract to deliver a certain number of crates at a fixed profit; that they had on hand the material to complete this contract at the date of the fire, and that it was impossible to replace this material, was competent to be heard by the jury upon the issue of damages. *Johnson v. Railroad,* 574.

In an action for damages to property alleged to have been burned by the emission of sparks from defendant's engine, it is competent to show that the same engine, shortly before or after the fire in question, emitted sparks. *Johnson v. Railroad,* 581.

Evidence that on the day after the burning of plaintiff's factory, a car of hulls attached to the engine, which it was alleged set fire to the factory, was seen on fire, is irrelevant as tending to prove the fact in issue—that the engine by the emission of sparks set fire to the factory. *Johnson v. Railroad,* 581.

Where defendant's witness testified to facts tending to show that plaintiffs' factory was not fired by defendant's engine and he was asked on cross-examination, whether or not he had made contradictory statements, which he denied, it was competent to show that he had made such statements, as impeaching but not as substantive evidence. *Johnson v. Railroad,* 581.

If fire escapes from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right-of-way, the defendant is not liable, for there is no negligence. *Williams v. Railroad,* 623.

If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right-of-way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable. *Williams v. Railroad,* 623.

If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, and the fire catches off the right-of-way, the defendant is liable. *Williams v. Railroad,* 623.

RATIFICATION CLAUSE. See "Auditor of Buncombe County."

READINESS TO PERFORM. See "Contracts."

REASONABLE INQUIRY. See "Register of Deeds."

REASONABLE TIME.

Where a contract calls for the delivery of goods "immediately," the party is entitled to a reasonable time to deliver them. *Claus v. Lee*, 552.

The question of reasonable time is a mixed question of law and fact, and except where the facts are few, simple and undisputed, and where only one inference can be drawn, or except where the time is so short or so long that the court may declare it reasonable or unreasonable, it should be left to the sound discretion of the jury under the instruction of the court upon the particular circumstances of the case. *Claus v. Lee*, 552.

REFERENCE. See "Accounting."

An appeal from an order or re-reference of a case to the referee to find a fact which the court deemed material, is premature and will be dismissed. *Chemical Co. v. Lackey*, 32.

If a party considers himself aggrieved by the ruling of the judge, on exceptions to the report of a referee, he should point out his objections by exceptions duly noted, and where the plaintiff filed a large number of exceptions to the referee's report and the judge confirms or modifies certain portions of the report and sets aside others, an exception, "the plaintiff excepts to such rulings adverse to it and appeals," is too general to be considered. *Commissioners v. Erwin*, 193.

This court has no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them. *Boyle v. Stallings*, 524.

REFORMATION AND CORRECTION.

In an action to recover lands and for damages for a trespass thereon, where the defendant denied the allegations of the complaint and alleged mutual mistake as a foundation for correcting the deed, but no issue was submitted by the court or tendered by the defendant upon this equitable defense, it was error to admit evidence of the alleged mistake. *Manufacturing Co. v. Cloer*, 128.

Where the defendant in his answer sets up a mistake in a deed under which he claims, but does not pray for a reformation thereof, yet the court may award such relief, if the allegations of the answer and the findings of the jury upon appropriate issues justify it. *Manufacturing Co. v. Cloer*, 128.

REGISTER OF DEEDS.

In an action against a register of deeds to recover the penalty under section 2090 of the Revisal, where there is a conflict of

REGISTER OF DEEDS—*Continued.*

evidence, whether there has been "reasonable inquiry," is to be submitted to the jury upon all the evidence under proper instruction; but if the facts are agreed, it is a matter of law. *Furr v. Johnson*, 157.

In an action against a register of deeds to recover the penalty under section 2090 of the Revisal, an instruction that if the jury found that the prospective groom told the defendant that the girl was 18, for he had seen her age in the Bible and she had told him she was 18; and should further find that defendant knew the witness Lowder well and knew him to be a man of good character, and that he stated to the defendant that the girl was 18, and that he lived just across the street from her family and signed the paper, not under oath, and that defendant honestly believed these statements and acted on them, believing them, the defendant made reasonable inquiry, is correct. *Furr v. Johnson*, 157.

Section 2088 of the Revisal does not require that the register shall make inquiry by examination of the witnesses in such cases under oath, but merely declares that he shall have "the power to do so." His using, or failing to use, such discretionary power is merely a circumstance to be considered by the jury. *Furr v. Johnson*, 157.

While the court may not prescribe any rule for the guidance of the register it would seem that "reasonable inquiry" involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. *Furr v. Johnson*, 157.

In an action against a register of deeds to recover the penalty under section 1814 of The Code, 2088-90 of the Revisal, the burden of proof is upon the plaintiff to show that the defendant knowingly or without reasonable inquiry, issued the license contrary to law. *Furr v. Johnson*, 157.

The office of register of deeds is constitutional, but the duties are statutory, and the Legislature may, within reasonable limits, change the duties and diminish the emoluments of the office, if the public welfare requires it to be done. *Fortune v. Commissioners*, 322.

REGISTERED VOTER. See "Elections."

REGISTRATION. See "Entries and Grants;" "Elections."

REHEARING. See "Justices of the Peace."

REMAINDERS AND REVERSIONS. See "Wills."

Where there has been a trespass committed on real property, causing permanent damage which impairs the value of the inheritance, the owner of the remainder or the reversion can maintain an action for the wrong done to his estate and interest. *Cherry v. Canal Co.*, 422.

The defendant having entered a general denial, any defect of parties which may have existed is waived; and if permanent damage is shown impairing the value of the inheritance, the plaintiff, as owner of two-thirds of the reversion after the life estate, has a right of action for the full amount of damage done to his two-thirds interest in the property. *Cherry v. Canal Co.*, 422.

Where there was execution against a life tenant in 1869 and sale thereunder and a subsequent conveyance back by the purchaser to him, the seven years' statute of adverse possession would not begin to run against the remaindermen, till his death. *Norcum v. Savage*, 472.

Dower is not allowed in estates in reversion or remainder expectant upon an estate of freehold; and hence, if the estate of the husband be subject to an outstanding freehold estate, which remains undetermined during the coverture, no right of dower attaches. *Redding v. Vogt*, 562.

REMEDIES.

Where a sale has been effected by an actionable fraud, the purchaser has an election of remedies. He may ordinarily, at least at the outset, rescind the trade, in which case he can recover the purchase price or any portion of it that he may have paid, or avail himself of the facts as a defense in bar of recovery of the purchase price or any part of it which remains unpaid, or he may hold the other party to the contract and sue him to recover the damages he has sustained in consequence of fraud. *May v. Loomis*, 350.

The sale having been ratified, the plaintiff can maintain an action on the notes, subject to any counterclaim the defendants may have. *May v. Loomis*, 350.

An action by the plaintiff on the notes of the defendant for the purchase price of certain machines, pursued to judgment and uncollected, is not a bar to an action to recover damages for fraud and deceit on the part of the defendant in procuring the sale. *Machine Co. v. Owings*, 503.

The doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail him-

REMEDIES—*Continued.*

self, and a choice of one is held to be an election not to pursue the other, but the principle does not apply to co-existing and consistent remedies. *Machine Co. v. Owings,* 503.

REPLY. See "Pleadings."

REPUGNANT CLAUSES. See "Insurance."

RESCISSION. See "Contracts."

In order to rescind, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm in part; he must do one or the other. *May v. Loomis,* 350.

As a general rule, a party is not allowed to rescind where he is not in a position to put the other *in statu quo* by restoring the consideration passed; or, after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end. *May v. Loomis,* 350.

Where the defendants have made payments in recognition of the contract and have continued to manufacture and sell the lumber after knowledge of the fraud and are not in a position to restore the consideration, they cannot rescind the trade and plead fraud in bar of recovery on the notes, but they can set up the fraud by way of counterclaim and recover for the damages suffered. *May v. Loomis,* 350.

Where the defendant consented to the cancellation or rescission of the original contract, in consideration of a substituted contract, his right to recover damages which had occurred prior to such rescission was waived or surrendered. *Lipschutz v. Weatherly,* 365.

A contract may be discharged by an express agreement that it shall no longer bind either party, provided it is supported by a valuable consideration, which may be either a payment in money, something of value, or by a release of mutual obligations arising out of the contract. *Lipschutz v. Weatherly,* 365.

When the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. *Redding v. Vogt,* 562.

Where, by the first contract to convey, a party acquired absolutely the entire estate in one-half of a tract of land, and by the

RESCISSION—*Continued.*

second contract he was given one-half interest in a life estate in that tract and other land, and took a deed in execution of the last contract, and thereupon entered into possession of the land and conveyed a part of it, the last contract and deed must be regarded as a substitute for the first contract and as a rescission of it, the two transactions being wholly irreconcilable, and those claiming under him must abide by its terms. *Redding v. Vogt*, 562.

Parties to a written contract may by parol rescind or by matter *in pais* abandon the same. *May v. Getty*, 310.

What will amount to an abandonment of a contract is a question of law and the acts and conduct which are relied on to constitute the abandonment should be clearly proved, and they must be positive, unequivocal and inconsistent with the existence of a contract, but when thus established they will bar the right to specific performance. *May v. Getty*, 310.

Where it appears that the vendee, in a contract for the sale of property at $2,350.00 had never paid any money, other than $100, paid on the date of the contract and never demanded a deed, and two years after the execution of the contract, left the State and has never since exercised any ownership or had possession of the property, and that he told the vendor twelve or thirteen years ago that he did not think he could pay for it, and if he could make his money out of the property, to go ahead and do so, and that he left the property with the intention of relinquishing all rights, *held*, these facts are sufficient to show a rescission and abandonment of the contract. *May v. Getty*, 310.

RES GESTAE. See "Principal and Agent;" "Evidence."

RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* does not dispense with the rule that he who alleges negligence must prove it. It is simply a mode of proving negligence and does not change the burden of proof. *Lyles v. Carbonating Co.*, 25.

An exception that the court failed to explain fully to the jury the doctrine of *res ipsa loquitur* cannot be sustained, where the appellant failed to hand up a prayer for instruction to that effect. *Lyles v. Carbonating Co.*, 25.

While the plaintiff was operating a lapper in a cotton mill it became choked and he stopped it with the belt shifter and put his hand into the beater bars to get the cotton out, and the machine, by some unknown means, started and tore his arm

RES IPSA LOQUITUR—Continued.

off, and there was evidence that the belt shifter was wider than the belt and that a piece of wood had been put on to make it correspond with the width of the belt, *held*, that the plaintiff, upon the doctrine of *res ipsa loquitur*, was entitled to have his case submitted to the jury. *Ross v. Cotton Mills*, 115.

The doctrine of *res ipsa loquitur* does not relieve the plaintiff of the burden of the issue, nor raise any presumption in his favor. The fact of the accident furnishes merely some evidence to go to the jury which requires the defendant "to go forward with his proof." *Ross v. Cotton Mills*, 115.

RESERVATION TO A STRANGER.

While a reservation will not give title to a stranger, it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of an adverse claim to the thing excepted or reserved. *Redding v. Vogt*, 562.

REVERSIONS. See "Remainders and Reversions."

REVISAL. See "Code, The;" "Acts."

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43. Inventory and Accounts. *Atkinson v. Ricks*, 420.
100-3. Inventory and Accounts. *Atkinson v. Ricks*, 420.
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3990. School Law. *Lowery v. School Trustees,* 47.
4646. Insurance. *Fishblate v. Fidelity Co.,* 593.

REVOCATION. See "Trusts."

RIGHT OF WAY. See "Railroads."

ROADS.

The Act of 1903, chapter 538, which establishes a road system and appropriates to the road fund one-half of the net proceeds of all dispensaries "now established or hereafter established" in Northampton County, applies to the dispensary established at Jackson under the Act of 1899, chapter 189, providing that one-third of the net proceeds shall go to the town and two-thirds to the public schools of the township. *Crocker v. Moore,* 429.

As one-half of the proceeds is subtracted by the Act of 1903 to be applied to the roads, the other half only remains to be applied in the ratio stated by the Act of 1899. *Crocker v. Moore,* 429.

The provisions in the Act of 1903 appropriating to the road fund one-half of the net proceeds of the dispensary is valid and the money should be paid to the road fund, even though other parts of the act were unconstitutional. *Crocker v. Moore,* 429.

The objection that the Act of 1903 takes the power of levying taxes for road purposes out of the hands of the county commissioners is without merit. The act provides merely that the board of road commissioners shall ascertain and decide as to the amount needed for working the road and the rate necessary to raise that sum, and report to the board of county commissioners, who shall levy the taxes. *Crocker v. Moore,* 429.

The fact that the road commissioners, under Act of 1903, chapter 538, may report an amount, which, added to the other necessary taxes, will exceed the constitutional limitation, does not render the statute invalid. *Crocker v. Moore,* 429.

ROADS—*Continued.*

The objection to the constitutionality of the Act of 1903, chapter 538, in that the act implies a part of the county capitation tax to the use of the public roads in violation of the Constitution, Article V, section 2, which appropriates the State and County poll tax "to the purposes of education and the support of the poor," cannot be sustained, as that provision applies to the levy of taxation for general, not special, purposes. *Crocker v. Moore,* 429.

Working the roads is a necessary expense and the act authorizing the county commissioners to levy a tax for such purpose without a vote of the people is valid under Article VII, section 7, of the Constitution. *Crocker v. Moore,* 429.

RULES OF CONSTRUCTION. See "Deeds;" "Insurance;" "Statutes."

RULES OF EMPLOYER. See "Railroads."

RULES OF SUPREME COURT.

Rules of Practice, 653.
Rule 5. Docketing Appeals. *Craddock v. Barnes,* 427.
Rule 27. Evidence. *Sprinkle v. Wellborn,* 180.
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RULES OF SUPERIOR COURT.

Rules of Practice, 678.
Rule 3. Right to Open and Conclude. *Brown v. R. R.,* 154.

SALES. See "Contracts;" "Vendor and Vendee;" "Judicial Sales;" "Damages."

SCHOOL TAX. See "Taxation."

SCHOOLS.

The school district prescribed by the Act of 1905, (Pri.) chapter 11, must include both races, and the taxes levied and collected upon the property and polls of both races in the district must be applied to the support and maintenance of a graded school for the children of both races, and in carrying out the provisions of the act, the imperative mandate of the Constitution, that there shall be no discrimination in favor of, or to the prejudice of, either race must be observed. *Lowery v. School Trustees,* 33.

The act establishing a graded school in the town of Kernersville, is construed to contain a positive direction to establish one school in which the children of each race are to be taught in separate buildings and by separate teachers, as the Constitution commands. *Lowery v. School Trustees,* 33.

SCHOOLS—*Continued.*

So much of section 7, of the Act of 1905, (Pri.) chapter 11, as undertakes to distinguish between the races in regard to the money apportioned from the public school fund is invalid. This, however, does not affect the other portions of the act. *Lowery v. School Trustees*, 33.

The defendants have no right to take the school building now provided for the colored children and use it for the whites. *Lowery v. School Trustees*, 33.

In executing the law, the defendants shall not discriminate against either race, but shall afford to each equal facilities. It is not intended by this that the taxes are to be apportioned between the races per capita, but that the school term shall be of the same length during the school year, and that a sufficient number of competent teachers shall be employed at such prices as the board may deem proper. Dictum in *Hooker v. Greenville*, 130 N. C., 473, disapproved. *Lowery v. School Trustees*, 33.

If the defendant board or its successor shall refuse to establish and maintain the school upon a constitutional basis and in accordance with the constitutional provisions, the courts have power, by the writ of *mandamus*, to compel them to do so. *Lowery v. School Trustees*, 33.

The two essential principles underlying the establishment and maintenance of the public school system of this State are: First, the two races must be taught in separate schools, and second, there must be no discrimination for or against either race. Keeping them in view, the matter of administration is left to the Legislature and the various officers, boards, etc., appointed for that purpose. *Lowery v. School Trustees*, 33.

The investigation of charges against the president of a college before its board of trustees, is not absolutely, but qualifiedly privileged, and so is the publication of the proceedings in pamphlet form, which was intended for circulation among the patrons of the college and those likely to become its patrons. *Gattis v. Kilgo*, 106.

Where a deed conveyed property "in trust for purposes of a school house for the education of freedmen and children irrespective of race," a lease of the property by the trustees for 200 years "to be used as a Baptist church and for the education of the youths of the colored race," is wholly unauthorized and in violation of the power conferred by the deed. *Thornton v. Harris*, 498.

SEIZIN. See "Dower."

SIDETRACKS.

Under sub-head 15 of section 2, chapter 164, Laws 1899, authorizing the Corporation Commission to require the construction of sidetracks to industries when the revenue accruing from such sidetrack is sufficient within five years to pay the expenses of its construction, an order requiring the railroad to construct a spur siding for the use of a lumber plant to hold four cars, about one and a quarter miles from a station, is not unreasonable, where it appears that the lumber shipped from said siding in two years would yield a revenue of $6,000.00 to the railroad, and the cost to the defendant of constructing it (the grading and crossties being furnished by the lumber company) would be about $200.00. *Corporation Commission v. Railroad*, 239.

Evidence that the plaintiff was permitted to show that a few years ago the defendant maintained a sidetrack at this same spot for two years without any inconvenience or accident, was competent to show the practicability of a sidetrack being established at this point. *Corporation Commission v. Railroad*, 239.

SLANDER AND LIBEL.

The investigation of charges against the president of a college before its board of trustees, is not absolutely, but qualifiedly privileged, and so is the publication of the proceedings in pamphlet form, which was intended for circulation among the patrons of the college and those likely to become its patrons. *Gattis v. Kilgo*, 106.

Any statement or communication is conditionally privileged when made *bona fide* about something in which (1) the speaker has an interest or duty; (2) the hearer has a corresponding interest or duty; and (3) when the statement or communication is made in protection of that interest or in performance of that duty. *Gattis v. Kilgo*, 106.

The standard of privilege is the standard of the law, not of the individual, and the privilege depends not on what the individual may have supposed to be his interest or duty, but upon what a judge decides, as a matter of law, his interest or duty to have been. *Gattis v. Kilgo*, 106.

The effect of the privilege is to cast upon the plaintiff the burden of showing malice on the defendant's part in uttering or publishing the alleged slanderous words. *Gattis v. Kilgo*, 106.

If one exceeds the privilege, its protection to him ceases and the ordinary rules of liability apply. *Gattis v. Kilgo*, 106.

SLANDER AND LIBEL—*Continued.*

Whether one has exceeded the privilege and whether he was actuated by malice are ordinarily questions for the jury. *Gattis v. Kilgo,* 106.

Proceedings before schools, religious, fraternal and like organizations, are within the class having only a qualified privilege and are protected by such privilege when it is properly used and not abused. *Gattis v. Kilgo,* 106.

Absolute privilege is generally confined to judicial and legislative proceedings and official communications of a public nature, where the interest of the public is directly concerned. *Gattis v. Kilgo,* 106.

SLAVES. See "Descent and Distribution;" "Marriage."

SPECIFIC PERFORMANCE. See "Contracts;" "Options."

What will amount to an abandonment of a contract is a question of law and the acts and conduct which are relied on to constitute the abandonment should be clearly proved, and they must be positive, unequivocal and inconsistent with the existence of a contract, but when thus established they will bar the right to specific performance. *May v. Getty,* 310.

In an action for the specific performance of a contract to convey, if the plaintiff can give a perfect title at the time of the trial, it is sufficient to induce a court of equity to compel performance of the contract. *May v. Getty,* 310.

In an action to compel specific performance of an option on land, where it appears that the plaintiff was arranging to raise the money within the time required by the option, when he was requested by the defendant that a postponement was desired for a year and the plaintiff agreed to the proposition and within the time fixed by the postponement, went to the defendant and tendered the amount and the same was refused, *held,* the defendant is estopped from pleading the statute of frauds or from denying his obligation and the plaintiff is entitled to specific performance. *Alston v. Connell,* 485.

An owner of land, who would insist upon strict performance by a prospective purchaser as a condition precedent to an action by the latter for the specific performance of an option to purchase, must not himself be the cause of the breach. *Alston v. Connell,* 485.

STANDING TIMBER. See "Contracts."

STATION PREMISES. See "Railroads."

STATUTES. See "Acts;" "Revisal;" "Code;" "Descent and Distribution;" "Statute of Distribution."

Every presumption is in favor of the validity of an act of the Legislature and all doubts are resolved in support of the act. *Lowery v. School Trustees*, 33.

Courts never assume that the Legislature intended to pass an unconstitutional act—they may resort to an implication to sustain an act, but not to destroy it. *Lowery v. School Trustees*, 33.

If the general scope and purpose of a statute are constitutional, and constitutional means are provided for executing such general purposes, the entire statute will not be declared void because some one or more of the details prescribed, or minor provisions incorporated, are not in accordance with the Constitution, provided such invalid parts may be eliminated without destroying or materially affecting the general purpose. *Lowery v. School Trustees*, 33.

A statute should be construed with reference to its general scope and the intent of the Legislature in enacting it and, in order to ascertain what was the purpose, we must give effect to all of its clauses and provisions. *Fortune v. Commissioners*, 322.

Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its object. *Fortune v. Commissioners*, 322.

The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the Legislature can be gathered from the context or from the general purpose and tenor of the enactment. *Fortune v. Commissioners*, 322.

Clerical errors, misprisions, mere inadvertences or omissions which, if not corrected, would render the statute unmeaning or incapable of reasonable construction or would defeat or impair its intended operation, will not necessarily vitiate the act, for they will be corrected, if practicable. *Fortune v. Commissioners*, 322.

A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain and convincing. *Fortune v. Commissioners*, 322.

The fact that the Machinery Act (chap. 590) was ratified two days later than chapter 703 should not have the effect of defeating

STATUTES—*Continued.*

the will of the Legislature otherwise sufficiently declared, judicial notice being taken of the requirements of the Constitution, Article II, section 14, that a law imposing taxes cannot pass unless the bill has been read on three several days. *Fortune v. Commissioners,* 322.

The adoption of the stock law does not abrogate in such locality a general statute or rule of law. *Shepard v. Railroad,* 391.

STATUTE OF DISTRIBUTION.

Where a fund consists solely of personalty and the claimants at the time of the intestate's death were and are now all in equal degree—the next kin of the intestate, the statute of distributions (Rev., sec. 132,) requires that the fund shall be distributed per capita. *Ellis v. Harrison,* 444.

STATUTE OF FRAUDS. See "Fraud."

The statute of frauds (Rev., sec. 974,) does not forbid an oral contract to assume the debt of another, who is thereupon discharged of all liability to the creditor, the promisor thus becoming sole debtor in his place and stead. *Jenkins v. Holley,* 379.

The fact that the plaintiff did not sign the contract so as to become in law bound for the payment of the purchase money does not prevent the contract from being a bilateral one, instead of a mere option. *Lumber Co. v. Corey,* 462.

To make a contract to sell growing trees binding on the vendor, it is sufficient that the contract be signed by him, and it is not necessary that it should be signed by the vendee. *Lumber Co.* v. *Corey,* 462.

In an action to compel specific performance of an option on land, where it appears that the plaintiff was arranging to raise the money within the time required by the option, when he was requested by the defendant that a postponement was desired for a year and the plaintiff agreed to the proposition and within the time fixed by the postponement, went to the defendant and tendered the amount and the same was refused, *held,* the defendant is estopped from pleading the statute of frauds or from denying his obligation and the plaintiff is entitled to specific performance. *Alston v. Connell,* 485.

STATUTE OF LIMITATIONS. See "Limitation of Actions."

STEAMSHIP COMPANIES.

Where the plaintiff testified that he purchased his ticket and was first to apply at the purser's office for a berth, but was refused,

STEAMSHIP COMPANIES—*Continued.*

though others who applied after him were supplied, and was compelled to sit up all night; that he applied to the defendant for a berth when he bought his ticket, but the defendant refused to supply berths until after the ship had left the dock, *held*, that it was error to nonsuit the plaintiff. *Patterson v. Steamship Co.*, 412.

STOCK LAW.

Section 2601, Revisal, which requires railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands, applies to a town lot as well as in the country and to stock law and non-stock law territory. *Shepard v. Railroad*, 391.

The adoption of the stock law does not abrogate in such locality a general statute or rule of law. *Shepard v. Railroad*, 391.

STREETS AND SIDEWALKS. See "Municipal Corporations."

SUBROGATION.

A surety company which has been called upon to pay a *devastavit* committed by its principal, an administrator, is entitled to be subrogated to the rights of the creditor against a party who received the money with knowledge of its wrongful appropriation and his rights are exactly those of the creditor. *Caviness v. Fidelity Co.*, 58.

SUBSTITUTION. See "Rescission."

SUPERIOR COURTS. See "Rules of Superior Courts;" "Courts, Power of."

SUPREME COURT. See "Rules of Supreme Court;" "Courts, Power of;" "Appeal and Error."

SURETYSHIP. See "Principal and Surety."

SURVIVAL OF CAUSE OF ACTION. See "Death."

SUSPENSION OF RIGHT OF ACTION.

The acceptance of a negotiable security for an open account suspends the right of action until the maturity of the note and then if the plaintiff will resort to his original cause of action, he must surrender the security. The acceptance of the promissory note, unless expressly so agreed upon, will not discharge the original cause of action. *Buggy Co. v. Dukes*, 393.

TAX LISTS. See "Auditor of Buncombe County."

TAXATION.

An order dissolving a restraining order, which had been granted until the hearing, against a tax levied by virtue of an election, authorizing a special school tax will not be reversed where the evidence was conflicting and the judge found as facts that one-fourth of the freeholders of the district signed the petition for the election and that a majority of the voters voted in favor of the special tax, and that while there were some irregularities in holding the election and recording the result, they were not of such nature as to vitiate the election. *Hyatt v. DeHart*, 270.

The objection that the Act of 1903 takes the power of levying taxes for road purposes out of the hands of the county commissioners is without merit. The act provides merely that the board of road commissioners shall ascertain and decide as to the amount needed for working the road and the rate necessary to raise that sum, and report to the board of county commissioners, who shall levy the taxes. *Crocker v. Moore*, 429.

The fact that the road commissioners, under Act of 1903, chapter 538, may report an amount, which, added to the other necessary taxes, will exceed the constitutional limitation, does not render the statute invalid. *Crocker v. Moore*, 429.

The objection to the constitutionality of the Act of 1903, chapter 538, in that the act applies a part of the county capitation tax to the use of the public roads in violation of the Constitution, Article V, section 2, which appropriates the State and County poll tax "to the purpose of education and the support of the poor," cannot be sustained, as that provision applies to the levy of taxation for general, not special, purposes. *Crocker v. Moore*, 429.

Working the roads is a necessary expense and the act authorizing the county commissioners to levy a tax for such purpose without a vote of the people is valid under Article VII, section 7, of the Constitution. *Crocker v. Moore*, 429.

TELEGRAPHS.

In an action against a telegraph company for damages for mental anguish, where it appears that the defendant delayed for twenty-eight hours to deliver to plaintiff the following telegram: "Come home at once. Your wife is bad off," and that immediately after its receipt he started home, having been informed of the delay, and on arrival found his wife very ill, that she continued so for eleven weeks and recovered, *held*, there was some evidence of mental anxiety. *Hamrick v. Tlegraph Co.*, 151.

TELEGRAPHS—*Continued.*

It was error to permit the plaintiff to testify as to a conversation about the telegram had with the agent of the defendant at the depot ten or fifteen minutes after the plaintiff received the telegram, which was handed him by his employer. *Hamrick v. Telegraph Co.*, 151.

The defendant having introduced plaintiff's telegram calling for an answer, it was competent to elicit from him whether or not he answered the telegram, without producing the telegram or accounting for its absence, no question being raised as to its terms. *Lipschutz v. Weatherly*, 365.

TENDER.

Where the defendant had refused to take the cotton on July 23, this was a breach of its contract and it is immaterial that the plaintiffs shipped the cotton on the 29th, as they were not required to make any delivery, the refusal dispensing in law with any tender, and the plaintiffs being entitled to recover if they were ready, willing and able to deliver and otherwise comply with the contract on their part. *Wilson v. Cotton Mills*, 52.

TENDER OF WITNESSES. See "Argument of Counsel."

TIMBER CONTRACTS. See "Contracts;" "Deeds."

TITLE. See "Ejectment;" "Processioning."

In a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust for the same beneficial owner, the title does not come in controversy. *Thornton v. Harris*, 498.

TOWNS. See "Municipal Corporations."

TRESPASS. See "Partnership;" "Ejectment."

Where there has been a trespass committed on real property, causing permanent damage which impairs the value of the inheritance, the owner of the remainder or the reversion can maintain an action for the wrong done to his estate and interest. *Cherry v. Canal Co.*, 422.

The defendant having entered a general denial, any defect of parties which may have existed is waived; and if permanent damage is shown impairing the value of the inheritance, the plaintiff, as owner of two-thirds of the reversion after the life estate, has a right of action for the full amount of damage done to his two-thirds interest in the property. *Cherry v. Canal Co.*, 422.

TRESPASS—*Continued.*

In an action brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where it appeared that the entire wrong was done in 1898 and 1899, the action was barred under Revisal, section 395, sub-section 3. *Cherry v. Canal Co.*, 442.

Revisal, section 394 (chapter 224, Laws 1905), which establishes the period of limitation as to permanent damages at five years, applies only to actions against railroad companies. *Cherry v. Canal Co.*, 422.

In an action for damages for trespass committed in cutting timber where the plaintiff relied alone on constructive possession arising out of its paper title which it alleged covered the land upon which the cutting was done, and where the jury found that the defendant had not trespassed and therefore that the plaintiff had no title to the *locus in quo*, this finding of the jury and the judgment of the court in accordance therewith are a complete bar to a motion in the action by plaintiff for the assessment of damages claimed by him to have accrued from a continuance of the same alleged trespass since the action was commenced, and this is true, though the plaintiff recovered nominal damages by reason of an agreement of counsel admitting a technical trespass. *Lumber Co. v. Lumber Co.*, 437.

While the act of entering upon land and cutting timber constitutes a continuing trespass for which successive actions may be brought, the plaintiff recovering damages in each to the date of his writ, yet this principle does not apply, so as to prevent a bar, where the plaintiff has failed to prove the unlawful entry or to show his possession, either actual or constructive, of the land upon which he alleges the defendant trespassed. *Lumber Co. v. Lumber Co.*, 437.

When the cause of action is based upon a wrongful invasion of plaintiff's rights of person or property, he may recover all such damages, either direct or consequential, as flow naturally and proximately from the trespass, whether they could or could not have been anticipated. *Johnson v. Railroad*, 574.

In an action to recover damages for an alleged trespass, where plaintiff's title was in issue, a request to instruct the jury "that if they find from the evidence that plaintiff has shown title out of the State under either the thirty-year statute or the twenty-one year statute, then the burden is upon the defendants to establish their contentions that they were in continuous, adverse possession by showing that the deeds upon which they

TRESPASS—*Continued.*

rely actually cover the land," was properly refused. ***Bullard v. Hollingsworth,* 634.**

TRESPASSERS. See "Railroads."

TRIALS. See "Newly Discovered Evidence;" "Practice."

The tendering of witnesses by the defendant for the purpose of having their fees taxed as costs does not amount to the introduction of evidence within the meaning of the Superior Court, rule 3, and does not take from the defendant the right to open and conclude the argument. ***Brown v. Railroad,* 154.**

When the parties come to trial in a justice's court, the justice should require the plaintiff to state "in a plain and direct manner the facts constituting the cause of action" and a denial by defendant or other facts constituting a defense. ***Smith v. Newberry,* 385.**

TROUSSEAU.

In an action for damages for mental anguish alleged to have been suffered by the plaintiff, by the negligent delay in delivering her valise containing her trousseau, whereby her wedding had to be postponed, where it appeared that she had already sued the defendant in an action for non-delivery of her valise and damage to the property, and that the suit was settled, she is precluded by the former settlement from claiming any damage for mental anguish in this action, if any such right she ever had. ***Eller v. Railroad,* 140.**

Where the defendant did not know of the intended marriage, the male plaintiff has no cause of action for the defendant's negligence in the delivery of the *feme plaintiff's* baggage, containing her trousseau. In this case the damage claimed was not in the contemplation of the parties and too remote. ***Eller v. Railroad,* 140.**

TROVER. See "Partnership."

TRUSTS AND TRUSTEES. See "Churches."

In an action for trespass commenced in 1902, in which defendants ask to have plaintiff declared trustee of the legal title for them, where plaintiff claims under an entry laid and surveyed in 1859, grant issued in 1867, and registered in 1884, and defendants claim under an entry laid in 1854, surveyed in 1855, entry price paid in 1858, and grant issued and registered in 1896, *held*, that the defendants are barred under section 158 of The Code. ***McAden v. Palmer,* 258.**

TRUSTS AND TRUSTEES—*Continued.*

The registration of the plaintiff's grant in 1884 vested the legal title in him and was constructive notice to all the world that he claimed the land as his own. *McAden v. Palmer*, 258.

If the defendants had shown possession of the land, their delay of eighteen years in suing would not have precluded them from seeking the aid of the court in converting the plaintiff into a trustee for their benefit, but as they show no such possession, they have slept on their rights too long. *McAden v. Palmer*, 258.

The contention that the husband's declarations are competent against him as a *cestui que trust*, in possession, is without merit, where neither the plaintiff nor the defendant derive their title from him, nor is he setting up any title to himself. *Daugherty v. Taylor*, 446.

Where a deed to the wife, who bought and paid for the land, was stolen or lost without registration, and after her death her husband procured another deed to be executed to himself, the husband held the land, by implication of law, as trustee for their children, subject to his life estate as tenant by the curtesy. *Norcum v. Savage*, 472.

This action to have the trust declared and a conveyance by the defendants, would be barred only by the lapse of ten years. *Norcum v. Savage*, 472.

The words in a letter from plaintiff's intestate to the defendant, "Until I give you further instructions, hold the sum of $1,000 for the support of my (natural) child in case of my death, for such a time as it may hold out," create a trust and not an agency that would expire with the death of the principal. *Witherington v. Herring*, 495.

The trust was not revoked by the will which requests testator's wife to carry out his wishes in regard to the care and custody of the child, but makes no provision for the child beyond the request to his wife, and there is no instruction or reference in the will to this fund and no further instructions were sent to the defendant. *Witherington v. Herring*, 495.

To create a trust, no technical terms need be used. It is sufficient if the language shows the intention to create a trust, clearly points out the property, the disposition to be made of it and the beneficiary. *Witherington v. Herring*, 495.

A power of revocation may be reserved and is perfectly consistent with the creation of a valid trust. If never exercised during the lifetime of the donor, and according to the terms in which

TRUSTS AND TRUSTEES—*Continued.*

it is reserved, the validity of the trust remains unaffected. *Witherington v. Herring*, 495.

Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," their successors will be appointed under Revisal, section 1037, by the clerk of the court. *Thornton v. Harris*, 498.

UNILATERAL CONTRACTS. See "Options."

"UPON" AND "WHEN."

Where an estate or interest is bequeathed or devised to one upon his becoming 21 years of age, or when he becomes 21, and in the meantime the property is given to a parent, guardian or trustee for the legatee's benefit, in such case the interest will vest at the death of the testator. *Hooker v. Bryan*, 402.

VACANCIES. See "Clerks of the Court."

VACANT LANDS. See "Entries and Grants;" "Cherokee Lands."

VENDOR AND VENDEE. See "Contracts."

The remedy of a vendor is not defeated where the fraudulent vendee has sold the property to an innocent purchaser, for in such case the proceeds of the sale are as available as the property itself. The fraudulent vendee becomes chargeable with the proceeds received from the innocent purchaser, but the property itself is not, and a personal judgment may be obtained against him. *Sprinkle v. Wellborn*, 163.

Where it appears that the vendee, in a contract for the sale of property at $2,350.00 had never paid any money, other than $100, paid on the date of the contract and never demanded a deed and two years after the execution of the contract, left the State and has never since exercised any ownership or had possession of the property, and that he told the vendor twelve or thirteen years ago that he did not think he could pay for it, and if he could make his money out of the property, to go ahead and do so, and that he left the property with the intention of relinquishing all rights, *held*, these facts are sufficient to show a rescission and abandonment of the contract. *May v. Getty*, 310.

The interest of a vendee in a contract for the purchase of property who has paid a part of the purchase money, is not the subject of sale under execution. *May v. Getty*, 310.

In an action for the specific performance of a contract to convey, if the plaintiff can give a perfect title at the time of the trial,

VENDOR AND VENDEE—*Continued.*

it is sufficient to induce a court of equity to compel performance of the contract. *May v. Getty*, 310.

Where the parties were not at arm's length with reference to false representations and did not have equal opportunity of informing themselves, the buyers' claim for relief for fraud is not barred on the ground that they were negligent. *May v. Loomis*, 350.

Where a sale has been effected by an actionable fraud, the purchaser has an election of remedies. He may ordinarily, at least at the outset, rescind the trade, in which case he can recover the purchase price or any portion of it that he may have paid, or avail himself of the facts as a defense in bar of recovery of the purchase price or any part of it which remains unpaid, or he may hold the other party to the contract and sue him to recover the damages he has sustained in consequence of the fraud. *May v. Loomis*, 350.

To make a contract to sell growing trees binding on the vendor, it is sufficient that the contract be signed by him, and it is not necessary that it should be signed by the vendee. *Lumber Co. v. Corey*, 462.

VERDICTS.

The court had the power to set aside the verdict of the jury, but it had no power to reverse the answer of the jury. As the judgment is not affected by this action, it is not reversible error and the case is left as if that issue had not been submitted. *Sprinkle v. Wellborn*, 163.

This court has unquestioned power to set a verdict aside when there is no evidence to support it. *Brown v. Power Co.*, 333.

When there is any evidence proper to be submitted to the jury, this court has no power to interfere with the verdict. *Brown v. Power Co.*, 333.

An agreement empowering the judge to sign judgment "out of term," gave him no power after the adjournment of the term to hear and pass upon a motion to set the verdict aside. *Knowles v. Savage*, 372.

VERIFIED ITEMIZED ACCOUNTS. See "Itemized Accounts."

VOTER. See "Elections."

WAIVER OF DAMAGES. See "Damages."

WARRANTY. See "Insurance."

While an action for breach of warranty arises out of contract and deceit is for a tort, yet when they both arise out of the same transaction they may be joined. *Smith v. Newberry*, 385.

In determining whether or not language used in connection with the sale of personal property constitutes a warranty, it is proper for the jury to consider the testimony in the light of the language used, the spirit in which the parties met and all of the other circumstances, and to find therefrom the intent with which the words were used by the seller and understood by the defendant, with proper instructions as to what constitutes warranty. *Beasley v. Surles*, 605.

WATER POWER. See "Eminent Domain."

"WHEN." See "Upon" and "When."

WIDOW. See "Year's Allowance."

WILLS.

To execute either a will or a deed the party must have sufficient mental capacity to understand what property he is disposing of, the person to whom he is giving or selling, and the purpose for which he is disposing of the property. *Bond v. Manufacturing Co.*, 381.

Where a testator in item 5 of his will gives his real estate to his nephew upon his becoming 21 and lends the same to his sister until his nephew is 21; and in item 6 he lends to his sister certain personal property in trust for his nephew until he becomes 21, and in item 7 he gives to his nephew said personal property, *held*, that where the nephew died after the death of the testator and before becoming 21, the court correctly adjudged that the heirs at law of said nephew were the owners of the real estate and his personal representatives the owners of the personal property. *Hooker v. Bryant*, 402.

Where an estate or interest is bequeathed or devised to one upon his becoming 21 years of age, or when he becomes 21, and in the meantime the property is given to a parent, guardian or trustee for the legatee's benefit, in such case the interest will vest at the death of the testator. *Hooker v. Bryan*, 402.

Semble: That in a case like the present, on the death of the remainderman, the previous disposition of the interest terminates, and the heirs at law and next of kin of the remainderman have a right to the immediate enjoyment of the property. *Hooker v. Bryan*, 402.

WILLS—*Continued.*

The trust was not revoked by the will which requests testator's wife to carry out his wishes in regard to the care and custody of the child, but makes no provision for the child beyond the request to his wife, and there is no instruction or reference in the will to this fund and no further instructions were sent to the defendant. *Witherington v. Herring*, 495.

Where a husband and wife owned a tract of land by entireties, and the husband died, leaving a will giving his wife a life estate in said tract and also in two stores and lot, and his entire personal estate valued at $200, and after her death the same property was given to their children, and the wife proved the will and qualified as executrix and took into her possession the personal estate and occupied the land for nine years until her death, such conduct was an election to claim under the will and her administrator, eight years after her death and against the consent of her real representatives, will not be permitted to make an election for her to claim against the will by simply filing a petition for the sale of said tract of land to make assets to pay her debts. *Hoggard v. Jordan*, 610.

WITHDRAWAL OF INCOMPETENT EVIDENCE. See "Harmless Error."

WITNESSES, TENDER OF. See "Argument of Counsel;" "Evidence."

YEAR'S ALLOWANCE.

In a proceeding for an allowment of year's allowance, under Revisal, sections 3091-5, the widow, who declined to take two children, by a former marriage, under 15 years of age, and keep them for one year and apply a portion of the money received as her allowance to their support, is entitled to only $300, and not an additional $100 for each of the children. *In re Stewart*, 28.

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